APPENDIX

TABLE OF CONTENTS

	Page
Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997)	1a
Ute Indian Tribe v. Utah, 935 F.Supp. 1473 (D.Utah 1996)	37a
Ute Indian Tribe v. Utah, 114 F.3d 1513 (10th Cir. 1997), *reh'g denied, unpublished order* (July 1, 1997)	158a
Act of May 27, 1902, ch. 888, 32 Stat. 245	160a
Act of March 3, 1095, ch. 1479, 33 Stat. 1048	161a

APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

No. 96-4073

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,
Plaintiff-Appellee,

v.

STATE OF UTAH; Duchesne County, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; DUCHESNE CITY, a municipal corporation, UINTAH COUNTY, a political subdivision of the State of Utah,
Defendants-Appellants,

and

UNITED STATES OF AMERICA,
Amicus Curiae.

May 8, 1997

Before TACHA, GODBOLD,* and HOLLOWAY, Circuit Judges.

TACHA, Circuit Judge.

This appeal requires us to address once again the status of the Uintah Valley Indian Reservation. In the district court, the Ute Indian Tribe ("Tribe") sought to obtain a

---

* The Honorable John C. Godbold, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

permanent injunction preventing the State of Utah, the counties of Duchesne and Uintah, and the cities of Roosevelt and Duchesne ("state and local defendants") from exercising civil and criminal jurisdiction on certain lands within the original exterior boundary of the Uintah Valley Reservation in a manner inconsistent with our en banc opinion in *Ute Indian Tribe v. Utah,* 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied,* 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). In opposing the injunction, the state and local defendants rely on *Hagen v. Utah,* 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), in which the Supreme Court held, contrary to our decision in *Ute Indian Tribe,* that the lands in question are not part of the Uintah Valley Reservation. Notwithstanding *Hagen,* the district court held that it was bound under the "law of the case" doctrine to follow our mandate in *Ute Indian Tribe* and thus, that it was without authority to alter the existing jurisdictional boundaries as set forth in *Ute Indian Tribe.* In light of the inconsistency between *Ute Indian Tribe* and *Hagen,* however, the district court requested that we issue instructions on how to proceed and suggested that we construe the request as an invitation to recall our mandate in *Ute Indian Tribe.*

The state and local defendants appeal, arguing that (1) our en banc decision in *Ute Indian Tribe* does not preclude their exercise of jurisdiction over former reservation lands under the doctrines of law of the case, collateral estoppel, or res judicata and (2) *Hagen* effectively overruled *Ute Indian Tribe,* permitting the defendants to exercise jurisdiction over all the lands originally held to be within reservation boundaries. Along with their appeal, the state and local defendants have filed a motion to recall, in its entirety, our mandate issued pursuant to *Ute Indian Tribe.* The United States as *amicus curiae* urges us to recall and modify the madate in *Ute Indian Tribe* only to the extent that it directly conflicts with *Hagen.* We exercise jurisdiction pursuant to 28 U.S.C. § 1291. Because we conclude that the boundaries of the Uintah Valley Reservation must be redetermined in light

of *Hagen*, we modify our holding in *Ute Indian Tribe* to the extent that it directly conflicts with the holding in *Hagen*.

BACKGROUND

I. INTRODUCTION

This case is unlike other reservation diminishment cases in which courts must decide whether congressional enactments opening reservation lands to non-Indian settlement have diminished or disestablished reservation boundaries. *See, e.g., Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973); *Seymour v. Superintendent of Wash. State Penitentiary*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); *United States v. Celestine*, 215 U.S. 278, 30 S.Ct. 93, 54 L.Ed. 195 (1909). Over a decade ago, we answered that question when we addressed whether congressional enactments from 1902 through 1905 had the effect of diminishing the Uintah Valley Reservation. *Ute Indian Tribe*, 773 F.2d at 1093. Sitting en banc in 1985, we held that the Reservation had not been diminished. *Id.* The Supreme Court denied *certiorari* on December 1, 1986. *Utah v. Ute Indian Tribe*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986).

The State of Utah sought to relitigate the boundary issue in three criminal actions commenced in the Utah state courts. In these cases, the Utah Supreme Court concluded that the 1902-1905 allotment legislation had diminished the Uintah Valley Reservation. *State v. Hagen*, 858 P.2d 925 (Utah 1992); *State v. Coando*, 858 P.2d 926 (Utah 1992); *State v. Perank*, 858 P.2d 927 (Utah 1992).

In 1994, the Supreme Court granted *certiorari* "to resolve the direct conflict between these decisions of the

Tenth Circuit and the Utah Supreme Court on the question whether the Uintah Reservation has been diminished." *Hagen*, 510 U.S. at 409, 114 S.Ct. at 964. The Supreme Court expressly disagreed with our decision in *Ute Indian Tribe* and held that the Unitah Valley Reservation had been diminished. *Id.* at 421-22, 114 S.Ct. at 970-71. In this appeal, we decide whether to modify our judgment in *Ute Indian Tribe*, after the time for rehearing has passed, in light of its conflict with a later, contrary decision of the Supreme Court.

II. *Ute Indian Tribe I-III:* THE DISTRICT COURT, PANEL, AND EN BANC OPINIONS

In 1975, the Tribe sought to exercise jurisdiction over all of the land originally encompassed in the Uintah Valley Reservation pursuant to the Tribe's newly enacted Law and Order Code. When non-Indians living in and around several towns within the original boundaries protested the action, the Tribe sought declaratory and injunctive relief in federal court to establish the exterior boundaries of the Uintah Valley Reservation and to restrain the state and local defendants from interfering with enforcement of the Law and Order Code within those boundaries. The Tribe argued that the original boundaries of the Uintah Valley Reservation, established by executive order in 1861 and confirmed by Congress in 1864, continued to exist undiminished. The Tribe thus argued that it had jurisdiction over all of the lands encompassed within the original boundaries of the Reservation because such lands were "Indian country" as defined by 18 U.S.C. § 1151.

On the other hand, the state and local defendants argued that congressional enactments from 1902 through 1905, opening Reservation lands to non-Indian settlement and setting aside lands for a national forest reserve, had the effect of diminishing the Uintah Valley Reservation. The defendants also argued that congressional enactments from 1894 to 1897 had the effect of completely disestablishing the Tribe's Uncompahgre Reservation.

In addressing the parties arguments, the district court gave a comprehensive summary of the relevant legislation, legislative history, contemporaneous interpretations by the executive branch, and other circumstances surrounding the enactment of the legislation. We therefore only briefly summarize the legislative treatment of the lands below.

A. Legislative Treatment of Reservation Lands

1. The Uintah Valley Reservation

In 1902, Congress passed legislation directing the Secretary of the Interior to make individual allotments out of the Uintah Valley Reservation by October 1, 1903, provided that a majority of the adult male members of the Ute Indians consented. Act of May 27, 1902, ch. 888, 32 Stat. 263, 263-64 ("1902 Act"). The 1902 Act stated that after October 1, 1903, "all the unallotted lands within said reservation *shall be restored to the public domain*" and subject to entry by non-Indians under the homestead laws. *Id.* (emphasis added). Congress delayed the allotment process, however, and extended the opening date in 1903 and again in 1904. Act of Mar. 3, 1903, ch. 994, 32 Stat. 982, 997-98; Act of Apr. 21, 1904, ch. 1402, 33 Stat. 189, 207-08. In 1905, Congress extended the opening date a third time—to September 1, 1905—and directed the Secretary to allot the Reservation unilaterally if the Tribe's consent was not obtained. Act of Mar. 3, 1905, ch. 1479, 33 Stat. 1048, 1069-70 ("1905 Act"). The 1905 Act did not contain the same language restoring the unallotted and unreserved lands to the "public domain," but provided that such lands *"shall be disposed of under* the general provisions of the homestead and townsite laws of the United States." *Id.* (emphasis added).

2. The National Forest Lands

In addition to extending the time of entry under the 1902 Act and describing the entry process, the 1905 Act authorized the President to "set apart and reserve" lands

in the Reservation as a forest reserve prior to opening. 33 Stat. 1070. Pursuant to this power, on July 14, 1905, President Theodore Roosevelt issued a proclamation designating some 1,010,000 acres within the Uintah Valley Reservation as an addition to the Uintah National Forest Reserve. Proclamation of July 14, 1905, 34 Stat. 3113, 3116. The proclamation also declared that the unallotted lands in the Uintah Valley Reservation, which were not otherwise reserved, would "be opened to entry, settlement and disposition under the general provisions of the homestead and townsite laws." *Id.* at 3120.

3. The Uncompahgre Reservation

In 1894, Congress passed legislation providing for the allotment of the Uncompahgre Reservation to individual members of the Tribe. The legislation stated that all unallotted lands "*shall . . . be restored to the public domain* and made subject to entry" under the homestaed and mineral laws. Act of Aug. 15, 1894, ch. 290, 28 Stat. 286, 337-38 (emphasis added). The allotment process, however, was delayed, and in 1897, Congress passed legislation mandating the allotment of the Uncompahgre Reservation and opening the unallotted lands to entry. Act of June 7, 1897, ch. 3, 30 Stat. 62, 87.

B. *Ute Indian Tribe I:* 1981 District Court Opinion

In 1981, the district court issued *Ute Indian Tribe v. Utah,* 521 F.Supp. 1072 (D.Utah 1981) (hereinafter "*Ute Indian Tribe I*"). The district court held that Congress's decision to open the unallotted lands to settlement did not diminish the Reservation's boundaries. *Id.* at 1132. The court recognized that the language of the 1902 Act directing that all unallotted lands "be restored to the public domain" would have diminished the Reservation had the unallotted lands then been opened for settlement. *Id.* at 1122. The court concluded, however, that the 1905 Act superseded the 1902 Act. *Id.* Unlike the 1902 Act,

the 1905 Act provided only that the unallotted lands were to "be disposed of under" the homestead and township laws. *Id.* at 1132. The district court reasoned that the new language indicated that Congress did not intend to diminish the Reservation. *Id.* The district court therefore concluded that the unallotted lands remained part of the Uintah Valley Reservation. *Id.*

The district court reached a different conclusion on the status of the National Forest Lands and the Uncompahgre Reservation. Regarding the National Forest Lands, the court concluded that the language in the 1905 Act empowering the president to "set apart and reserve" timber lands for a national forest demonstrated Congress's clear intent to diminish the Uintah Valley Reservation. *Id.* at 1136. Likewise, the district court concluded that the language in the 1894 Act restoring unallotted reservation lands "to the public domain" showed a clear congressional intent to disestablish the Uncompahgre Reservation. *Id.* at 1106.

C. *Ute Indian Tribe II:* The 1983 Court of Appeals Panel Decision

In a two-judge majority opinion, a panel of this court affirmed the district court opinion in part and reversed in part. *Ute Indian Tribe v. Utah,* 716 F.2d 1298 (10 Cir. 1983) (hereinafter "*Ute Indian Tribe II*"). The panel held that none of the lands in question remained within the original reservation boundaries.

The panel agreed with the district court that the 1902 Act's language restoring the unallotted lands "to the public domain" was sufficient to diminish the Uintah Valley Reservation. *Id.* at 1308-09. Unlike the district court, however, the panel concluded that the 1905 Act did not supersede Congress's intent to diminish the Reservation under the 1902 Act. *Id.* at 1311. Thus, the panel held that the

1902-1905 allotment legislation had diminished the Uintah Valley Reservation. *Id.* at 1311-12.

The panel agreed with the district court's conclusions regarding the National Forest Lands and the Uncompahgre Reservation. The panel concluded that Congress intended to withdraw the National Forest Lands, *id.* at 1314, and the Uncompahgre Reservation, *id.* at 1307, from their original reservation status.

D. *Ute Indian Tribe III:* The 1985 Court of Appeals En Banc Decision

On rehearing en banc, a majority of the court held that all of the lands at issue retained their reservation status. *Ute Indian Tribe v. Utah,* 773 F.2d 1087, 1093 (10th Cir.1985) (en banc) (hereinafter "*Ute Indian Tribe III*"). The en banc court concluded that the 1902-1905 allotment legislation did not have the effect of diminishing or disestablishing the Uintah Valley Reservation. *Id.* at 1089. Similarly, the court held that the withdrawal of the National Forest Lands did not diminish the Uintah Valley Reservation, *id.* at 1090, and that the 1894 and 1897 allotment legislation did not disestablish the Uncompahgre Reservation. *Id.* at 1093.

In reaching a holding completely contrary to the panel, the en banc court relied on the newly-decided case of *Solem v. Bartlett,* 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984). The court concluded that under *Solem,* congressional language restoring reservation lands to the public domain "is not the same as a congressional state of mind to diminish," and hence "does not reliably establish the clear and unequivocal evidence of Congress' intent to change the boundaries." *Ute Indian Tribe III,* 773 F.2d at 1092. Further, the court found no legislative history or other contemporary historical evidence sufficient to support a finding of diminishment or disestablishment as to any of

the lands in question. *Id.* at 1092-93. Thus, the court held that all the lands retained their reservation status and remained Indian country, subject to the jurisdiction of the Tribe and the federal government. Thereafter, the Supreme Court denied *certiorari*. *Utah v. Ute Indian Tribe,* 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986).

III. *Utah v. Hagen*: The 1994 Supreme Court Decision

In several related criminal cases arising in the late 1980s, the Utah Supreme Court ruled, contrary to the Tenth Circuit, that the original boundaries of the Uintah Valley Reservation had been diminished by the 1902-1905 allotment legislation. *See State v. Perank,* 858 P.2d 927 (Utah 1992); *State v. Coando,* 858 P.2d 926 (Utah 1992); *State v. Hagen,* 858 P.2d 925 (Utah 1992). The cases arose as a result of state felony prosecutions against three Indians for crimes committed in Myton and Roosevelt, Utah, two towns within the original boundaries of the Uintah Valley Reservation. The defendants challenged the prosecutions on the basis that the state trial court lacked jurisdiction over their crimes because the defendants committed their crimes in "Indian country" as defined by 18 U.S.C. § 1151(a). The defendants argued that under our en banc decision in *Ute Indian Tribe II,* the towns remained within the Reservation and thus within Indian country. The State of Utah, on the other hand, argued that our holding in *Ute Indian Tribe III* was wrong, that the Reservation had been diminished, and that the towns were outside the Reservation and thus outside Indian country. The Utah Supreme Court agreed with the State, and held that because the Reservation had been diminished, the state trial court properly exercised criminal jurisdiction over the defendants. *Perank,* 858 P.2d at 953; *Coando,* 858 P.2d at 927; *Hagen,* 858 P.2d 925-26.

In 1993, the Supreme Court granted *certiorari* in *Hagen* to resolve the conflict between the decisions of the Tenth

Circuit and the Utah Supreme Court. *Hagen v. Utah*, 507 U.S. 1028, 113 S.Ct. 1840, 123 L.Ed.2d 466 (1993). In 1994, the Supreme Court affirmed the Utah Supreme Court's resolution of the boundary issue, expressly rejecting *Ute Indian Tribe III*'s conclusion that the Uintah Valley Reservation had not been diminished. *Hagen v. Utah*, 510 U.S. 399, 421-22, 114 S.Ct. 958, 970-71, 127 L.Ed. 2d 252 (1994).

In *Hagen*, the Supreme Court performed a familiar analysis of the statutory language, legislative history, and contemporary historical understanding of the allotment legislation at issue. *See id.* at 410-21, 114 S.Ct. at 964-71. The Court's analysis, however, was limited to the status of the unallotted Uintah Valley Reservation lands opened to settlement under the 1902-1905 allotment legislation. *See id.* The Court did not address the National Forest Lands or the Uncompahgre Reservation, neither of which was before the Court for consideration. After looking to the three diminishment factors, the Court concluded that Congress's "baseline intent to diminish the Reservation expressed in the 1902 Act survived the passage of the 1905 Act," *id.* at 415, 114 S.Ct. at 967, and that the "[c]ontemporary historical evidence supports [the] conclusion that Congress intended to diminish the Uintah Reservation." *Id.* at 416, 114 S.Ct. at 968. The Court therefore upheld the State of Utah's exercise of criminal jurisdiction over acts occurring within the original boundaries of the Uintah Valley Reservation. *Id.* at 421-22, 114 S.Ct. at 970-71.

IV. *Ute Indian Tribe IV:* The 1996 District Court Decision

Immediately after the Utah Supreme Court issued its slip opinions in the state criminal cases, the Tribe filed a motion in federal district court seeking a permanent injunction preventing the state and local defendants from enforcing or relying upon *Perank*, *Coando* and *Hagen* in any way. On August 31, 1992, the state and local defendants

and the Tribe entered into a stipulation, under which the state and local defendants agreed to refrain from enforcing the Utah Supreme Court decision in *Perank* or exercising jurisdiction in any manner inconsistent with the en banc decision in *Ute Indian Tribe III*, pending a decision on the merits in the district court. The district court incoroprated the stipulation into an order dated September 2, 1992 ("Injunction Order").

In 1993, after the Supreme Court granted *certiorari* in *Hagen*, the district court stayed further proceedings on the Tribe's motion pending the outcome *of Hagen* in the Supreme Court. On February 23, 1994, the Supreme Court issued its decision in *Hagen*. On April 24, 1994, the state and local defendants filed a motion to vacate and set aside the Injunction Order and to dismiss the Tribe's motion for permanent injunctive relief.

On May 2, 1994, the district court modified the Injunction Order "to allow the [s]tate and [l]ocal [d]efendants to prosecute felony crimes occurring on lands within the original boundaries of the Uintah Valley Reservation which are not 'Indian country' as defined by 18 U.S.C. § 1151, *et seq.*" The court emphasized that it was "not determining one way or another which lands may or may not constitute 'Indian country' " [1]

On April 2, 1996, the district court issued *Ute Indian Tribe v. Utah*, 935 F.Supp. 1473 (D.Utah 1996) ("*Ute Indian Tribe IV*"). In a comprehensive and detailed opinion, the district court fully addressed the binding effect, as between the parties, of our earlier en banc decision in *Ute Indian Tribe III*, as well as the extent of direct con-

---

[1] The district court modified its order to allow the State of Utah to prosecute felonies on former reservation lands because in *United States v. Duncan*, 857 F.Supp. 852 (D.Utah 1994), the district court had dismissed a federal felony prosecution against an Indian for acts occurring in Roosevelt, Utah. The court ruled that *Hagen* precluded federal jurisdiction on such lands. *Id.* at 853.

flict between *Ute Indian Tribe III* and *Hagen*. *Id.* at 1484-1516. Rather than finally deciding these issues, however, the district court held that it was bound under "law of the case" rules to enforce the mandate in *Ute Indian Tribe III*. *Id.* at 1516-25. Thus, the district court did not reach the merits of the Tribe's request for permanent injunctive relief. *Id.* In lieu of a final resolution of the dispute, the district court requested that we issue instructions on how to proceed and suggested that we construe the request as an invitation to recall our mandate in *Ute Indian Tribe III*. The court also concluded that the Injunction Order, as modified, should remain in effect to allow the state and local defendants to prosecute criminal felonies occurring on former Uintah Valley Reservation lands. *Id.* at 1531. This appeal followed.

DISCUSSION

I. INTRODUCTION

On appeal, the Tribe maintains that principles of finality require the district court to enjoin permanently the state and local defendants from exercising jurisdiction in a manner inconsistent with *Ute Indian Tribe III*. On the other hand, the state and local defendants argue that we should give effect to the contrary boundary determinaton in *Hagen* by recalling the mandate in *Ute Indian Tribe III* in its entirety and reinstating the original Tenth Circuit panel opinion. The United States as *amicus curiae* urges us to recall and modify the mandate in *Ute Indian Tribe III* only to the extent that it directly conflicts with *Hagen*.

In resolving this dispute, we follow a three-part framework. First, we decide whether the district court was bound to follow the mandate in *Ute Indian Tribe III* by continuing the Injunction Order. After concluding that the district court properly followed our mandate, we nevertheless decide whether to modify *Ute Indian Tribe III* in light of the inconsistent boundary determination in *Hagen*. Finally, after concluding that *Ute Indian Tribe III* should

be modified, we decide whether to recall our mandate in its entirety or modify our en banc opinion only to the extent that it directly conflicts with *Hagen*. Because of the importance of finality, we conclude that *Ute Indian Tribe III* should be modified only to the extent that it conflicts with *Hagen*.

II. The Binding Effect of Ute Indian Tribe III

We begin by determining the binding effect of *Ute Indian Tribe III* on the allocation of jurisdiction among the federal government, the Tribe, and the state and local defendants. Whether the district court was bound by the mandate in *Ute Indian Tribe III* to continue the Injunction Order, and whether this court is bound by principles of finality to enforce our prior boundary determination, are separate inquiries. We address each question in turn.

A. The Mandate Rule

The state and local defendants first contend that the district court erred in holding that it was bound by *Ute Indian Tribe III* to continue to enjoin their exercise of civil and non-felony jurisdiction despite the Supreme Court's decision in *Hagen*. We review the district court's decision to continue an injunction for an abuse of discretion, examining "whether the district court committed an error of law or relied on clearly erroneous fact findings." *Walmer v. United States Dep't of Defense*, 52 F.3d 851, 854 (10th Cir.), *cert. denied* —— U.S. ——, 116 S.Ct. 474, 133 L.Ed.2d 403 (1995). We review questions of law decided by the district court de novo. *Harolds Stores, Inc. v. Dillard Dep't Stores, Inc.*, 82 F.3d 1533, 1555 (10th Cir.), *cert. denied*, —— U.S. ——, 117 S.Ct. 297, 136 L.Ed.2d 216 (1996).

The district court concluded that it was bound by the "law of the case" doctrine to enforce the boundary determinations in *Ute Indian Tribe III*. Under that doc-

trine, once a court decides an issue, the same issue may be relitigated in subsequent proceedings in the same case. *Arizona v. California,* 460 U.S. 605, 618-19, 103 S.Ct. 1382, 1391-92, 75 L.Ed.2d 318 (1983); *United States v. Monsisvais,* 946 F.2d 114, 115-16 (10th Cir. 1991). An important corollary of the doctrine, known as the "mandate rule," provides that a district court "must comply strictly with the mandate rendered by the reviewing court." *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America,* 962 F.2d 1528, 1534 (10th Cir. 1992); *see also Mason v. Texaco, Inc.,* 948 F.2d 1546, 1553 (10th Cir. 1991) ("Under the 'law of the case' doctrine, the district court may not deviate from the appellate court's mandate."). In this case, the district court concluded that the mandate in *Ute Indian Tribe III* remained in effect and therefore ruled that it was bound to follow the mandate by continuing to enjoin the defendants' exercise of jurisdiction.

The state and local defendants contend that the district court is not bound by the mandate in *Ute Indian Tribe III* because of an intervening change in controlling law, an exception to the mandate rule. *See Pittsburg & Midway Coal Mining Co. v. Watchman,* 52 F.3d 1531, 1536 n. 4 (10th Cir.1995). The defendants maintain that because *Hagen* was "intervening" (*i.e.,* coming after *Ute Indian Tribe III* but before the Tribe's present motion for injunctive relief), the district court should have departed from the appellate mandate and followed the boundary determination in *Hagen.* The defendants contend that the district court, by failing to do so, wrongfully continued to enjoin their exercise of jurisdiction pursuant to *Hagen.*

The argument of the state and local defendants is without merit. In short, the intervening-change-in-law exception does not apply where, as here, the case in which the erroneous ruling occurred is no longer sub judice—that is, where the case has become final. *See Colorado Interstate Gas,* 962 F.2d at 1534 (holding that once an appellate

court resolves an issue and remands the case to enter judgment in accordance with the mandate, the district court may not disregard the mandate and apply a later change in law on remand because the question is no longer sub judice); *Collins v. City of Wichita*, 254 F.2d 837, 839 (10th Cir.1958) (holding that "[a] change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies" setting aside a final judgment).

In *Ute Indian Tribe III*, our en banc opinion disposed of all boundary questions at issue on the merits. Our ruling left nothing for the district court to address beyond the "ministerial dictates of the mandate." *Colorado Interstate Gas Co.*, 962 F.2d at 1534. In other words, the case was no longer sub judice after December 9, 1986. As of that date, the district court was without authority to depart from an appellate mandate based on a later change in law. Because *Ute Indian Tribe III* proceeded to a final decision, a later change in law could not "reopen the door already closed." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541, 111 S.Ct. 2439, 2446, 115 L.Ed.2d 481 (1991). Accordingly, we hold that the district court properly followed our mandate in *Ute Indian Tribe III* by continuing to enjoin the state and local defendants from exercising jurisdiction pursuant to *Hagen*.

B. Modification of *Ute Indian Tribe III*

Although the district court did not err in holding that it was bound by *Ute Indian Tribe III*, we nevertheless must decide whether to modify our judgment in *Ute Indian Tribe III* in light of the Supreme Court's inconsistent boundary determination in *Hagen*. The question whether to modify our earlier judgment raises competing concerns involving the finality of a court's judgment and the need for uniformity in decisionmaking throughout the federal court system. In deciding this question, we first discuss whether an appellate court has the power to modify a

mandate and the circumstances in which exercise of that power is appropriate. With these circumstances in mind, we next determine whether we are precluded by the principles of collateral estoppel or res judicata from departing from the boundary determination of *Ute Indian Tribe III*. Finally, after concluding that we are not bound by the traditional principles of finality, we directly confront the relative importance of finality and uniformity in the context of this case.

1. The Power of an Appellate Court to Modify a Mandate

The defendants' motion to recall the mandate in *Ute Indian Tribe III* requires us first to ask whether an appellate court possesses the authority to recall or modify a mandate after the time for rehearing has passed. In this circuit, as in all circuits that have addressed the issue, "an appellate court has power to set aside at any time a mandate that was procured by fraud or act to prevent an injustice, or to preserve the integrity of the judicial process." *Coleman v. Turpen*, 827 F.2d 667, 671 (10th Cir.1987); *see also American Iron & Steel Inst. v. EPA*, 560 F.2d 589, 593 n. 15 (3d Cir.1977) (listing cases); *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 275-80 (D.C.Cir. 1971) (discussing particular ground for recalling a mandate). Although the rule is stated in broad terms, the appellate courts have emphasized that the power to recall or modify a mandate is limited and should be exercised only in extraordinary circumstances. *See American Iron & Steel Inst.*, 560 F.2d at 594 (emphasizing that recall of a mandate is an extraordinary remedy, one to be used sparingly").[2] The limited nature of this power

[2] Indeed, we have found only one case in which we have departed from a prior mandate after a final decision because of a later change in law. In *Pierce v. Cooke & Co.*, 518 F.2d 720, 723 (10th Cir.1975), we permitted relitigation of already settled claims where plaintiffs with claims under state law were forced to litigate in federal court because of diversity and received "substantially differ-

is a reflection of the importance of finality: once parties are afforded a full and fair opportunity to litigate, the controversy must come to an end and courts must be able to clear their dockets of decided cases. As the Third Circuit explained, "[P]arties should be afforded ample opportunity to litigate their claims, but once a final disposition is reached they should not expect that the good offices of the court will be available for a chance to press their claims anew." *Id.* at 592. Mindful of the important limitations on an apellate court's power to disrupt a settled judgment, we next address whether we are precluded from modifying the mandate in *Ute Indian Tribe III* under the principles of collateral estoppel or res judicata.

2. Collateral Estoppel and Res Judicata

In seeking permanent injunctive relief against the state and local defendants, the Tribe contends that collateral estoppel and res judicata preclude the state and local defendants from relying on *Hagen*. In particular, the Tribe argues that the Court should enjoin the defendants' enforcement of *Hagen* under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283,[8] which permits a federal court to enjoin proceedings in state court where the party asserting a claim or issue in the state court is barred from doing so by res judicata or collateral estoppel. *See Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 150-51, 108 S.Ct. 1684, 1691-92, 100 L.Ed.2d 127 (1988) ("The relitigation exception was designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the fed-

---

ent treatment than that [later] received in state court by another injured in the same accident." *Id.* at 723. *Pierce* was an "extraordinary case" based on an "unusual combination of events" and is not applicable to the case before us today. *Id.*

[8] Section 2283 provides: "A court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."

eral court. It is founded in the well-recognized concepts of res judicata and collateral estoppel."). The Tribe argues that because *Ute Indian Tribe III* produced a final judgment on the merits (thereby resolving the boundary issue in favor of the Tribe), the doctrine of collateral estoppel binds this court and precludes the defendants from enforcing the contrary holding in *Hagen*. The Tribe maintains that the Supreme Court's decision in *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 101 S.Ct. 2424, 69 L.Ed.2d 103 (1981), prohibits any departure from the settled boundary determination of *Ute Indian Tribe III*, even where that decision is erroneous in light of a late change in law.

We disagree that *Federated Department Stores* controls the outcome of this case. In *Federated Department Stores*, 452 U.S. at 398, 101 S.Ct. at 2427-28, the Supreme Court rejected an attempt by the Ninth Circuit to craft an exception to the doctrine of res judicata based on a later change in controlling law. The case involved seven retail purchasers who brought separate actions against the owners of various department stores, alleging that the stores had engaged in illegal price fixing. *Id.* at 395-96, 101 S.Ct. at 2426-27. After the district court dismissed the actions on the grounds that the plaintiffs had failed to state a claim for relief under the applicable statute, five of the plaintiffs appealed the ruling and, ultimately, obtained a reversal by the Supreme Court. *Id.* at 396, 101 S.Ct. at 2426-27. Instead of appealing the district court's ruling as the other five plaintiffs had done, two plaintiffs refiled their actions in state court, which were removed to federal court. *Id.* The federal district court held that because the two plaintiffs sought to relitigate the same claim against the same defendants, the actions had to be dismissed under the doctrine of res judicata. *Id.* at 396-97, 101 S.Ct. at 2426-27.

The two plaintiffs appealed to the Ninth Circuit. *Id.* at 397, 101 S.Ct. at 2427. While their appeal was pending, the Supreme Court announced that the other plain-

tiffs had stated a claim for relief. *Id.* The Ninth Circuit concluded that the two plaintiffs should be allowed to benefit from the Supreme Court's decision because their position was closely interwoven with the other five cases. *Id.* The court stated that because all of the dismissals rested on precedent that the Supreme Court had since overruled, the doctrine of res judicata must give way to the competing concerns of "public policy" and "simple justice." *Id.* at 398, 101 S.Ct. at 2427.

In reversing, the Supreme Court expressly rejected the Ninth Circuit's "novel exception to the doctrine of res judicata." *Id.* The Court explained:

> [W]e do not see the grave injustice which would be done by the application of accepted principles of res judicata. . . . The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determination of the equities of a particular case. There is simply no principle of law or equity which sanctions the rejection by a federal court of the salutary principle of res judicata. . . . This Court has long recognized that [p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be considered forever settled as between the parties.

Id. at 401, 101 S.Ct. at 2429 (citations and internal quotation marks omitted).

Contrary to the Tribe's argument, our case is distinguishable from *Federated Department Stores* in two important respects. First, in contrast to *Federated Department Stores,* where the issue was whether a change in law would permit the incipient relitigation of an issue resolved in a prior suit, the State of Utah in this case has already relitigated the boundary issue. We are not now deciding whether a party—in this case the State—deserves a second bite at the apple. The boundary relitigation is over.

The Utah Supreme Court has issued a final ruling, which the United States Supreme Court has affirmed, resulting in a clearly inconsistent judgment. For this reason, the Tribe's reliance on collateral estoppel is misplaced.

Second, in deciding whether to modify *Ute Indian Tribe III*, we are not motivated by a desire to achieve a more accurate judgment or to avoid the injustice that might result from a strict application of the principles of finality, as was the case in *Federated Department Stores*. The fact that *Ute Indian Tribe III* may have been wrongly decided or operates unfairly against the state and local defendants is not a concern that informs our analysis. *See* 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4426, at 265 (1981) ("If relitigation were permitted whenever it might result in a more accurate determination, in the name of 'justice,' the very values served by preclusion would be quickly destroyed."). Rather, our decision is based on the need to reconcile two inconsistent boundary determinations and to provide a uniform allocation of jurisdiction among separated sovereigns. For this reason, *Federated Department Store*'s relevance to this case is limited. The question here is not whether the State of Utah should be able to relitigate the boundary issue (which it has already done), but which decision—*Ute Indian Tribe III* or *Hagen*—should control the allocation of jurisdiction among the state and local defendants, the Tribe, and the federal government. The State's successful relitigation of the boundary issue has put the judgment in *Ute Indian Tribe III* on a collision course with *Hagen*, and therefore, we must directly confront whether *Ute Indian Tribe III* should give way to the equally final, contrary judgment in *Hagen*. To that inquiry, we now turn.

3. Finality and Uniformity

As discussed above, the question whether to modify our judgment in *Ute Indian Tribe III* raises the compet-

ing concerns of finality and uniformity. Thus, in deciding this question, we must assess the relative importance of finality and uniformity in the context of this case.

Although we are not bound by collateral estoppel to enforce the boundary determination of *Ute Indian Tribe III*, departure from the settled judgment implicates the important purposes of finality. Over a century ago, the Supreme Court discussed the importance of finality:

> This general rule is demanded by the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination. Its enforcement is essential to the maintenance of social order, for the aid of judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals in respect of all matters properly put in issue, and actually determined by them.

Southern Pac. Ry. Co. v. United States, 168 U.S. 1, 49, 18 S.Ct. 18, 27-28, 42 L.Ed. 355 (1897); *see also Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 467 n. 6, 102 S.Ct. 1883, 1890 n. 6, 72 L.Ed.2d 262 (1982). The Court also has addressed the particular purposes of finality:

> To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

Montana v. United States, 440 U.S. 147, 153-54, 99 S.Ct. 970, 973-74, 59 L.Ed.2d 210 (1979). Accordingly, before departing from a settled decision, we must consider whether such departure might "substantially frustrate [collateral estoppel's] purpose of protecting litigants from burdensome relitigation and of promoting judicial econ-

omy." *United States v. Stauffer Chem. Co.* 464 U.S. 165, 172, 104 S.Ct. 575, 579, 78 L.Ed.2d 388 (1984).

The Tribe contends that departure from *Ute Indian Tribe III* would frustrate the important purposes of finality and would upset its reasonable expectations in the continuing validity of a settled judgment. The litigation that led to *Ute Indian Tribe III* lasted ten years and resulted in a costly victory for the Tribe. It also consumed important judicial resources. Perhaps most important from the Tribe's point of view, the decision in *Ute Indian Tribe III* purported to define conclusively the respective jurisdictional boundaries of the various governmental authorities operating in and around the Uintah Valley Reservation. Indeed, the Tribe continues to rely on *Ute Indian Tribe III* in exercising civil and non-felony jurisdiction on lands within the original reservation boundaries. "When a court has determined disestablishment of a given reservation in its particular historical and factual setting, prevention of inconsistent adjudication becomes desirable insofar as it fosters reliance on judicial decision making." *White Earth Band of Chippewa Indians v. Alexander,* 683 F.2d 1129, 1135 (8th Cir. 1982). The Tribe argues that this reasoning, as well as the other important purposes of finality, support enforcement of the settled judgment of *Ute Indian Tribe III.*

The same important purposes of finality, however, apply equally to the final judgment in *Hagen.* Once *Hagen* became final, the State of Utah was entitled to rely on the collateral estoppel effect of that judgment just as the Tribe was entitled to rely on its judgment in *Ute Indian Tribe III.* Had the Tribe brought its present request for injunctive relief prior to the conclusion of the state litigation in *Hagen,* the principle of finality clearly would have favored the Tribe and might, even have required an injunction against the state proceedings. *See Parsons Steel, Inc. v. First Ala. Bank,* 474 U.S. 518, 524, 106 S.Ct. 768, 772, 88 L.Ed.2d 877 (1986) (holding that the re-

litigation exception to the Anti-Injunction Act does not permit a federal court to enjoin a state court proceeding "once the state court has finally rejected a claim of res judicata"). In this situation, however, where the State has already relitigated the boundary issue, the economy and judicial resource concerns that normally operate to preclude a second lawsuit are of little relevance. Although the Tribe may have a more forceful reliance interest given the length of time *Ute Indian Tribe III* has remained in effect, enjoining the state and local defendants in this suitation would do little to further the core purposes of finality. As discussed above, the second litigation has proceeded to a final judgment and has already resulted in an inconsistent decision.

Moreover, we note that "res judicata and collateral estoppel . . . promote the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry,* 449 U.S. 90, 95-96, 101 S.Ct. 411, 415, 66 L.Ed.2d 308 (1980). Thus, enjoining the State's enforcement of *Hagen* in this situation would "violate basic tenets of comity and federalism." *Kremer,* 456 U.S. at 478, 102 S.Ct. at 1896. By reaching the merits in *Hagen,* the Utah Supreme Court effectively ruled that the State was not precluded from relitigating the boundary issue. In the absence of a successful challenge to this ruling in the Supreme Court, we must give full effect to the state court judgment and may not impose "the highly intrusive remedy of a federal-court injunction against the enforcement of the state court judgment." *Parsons Steel, Inc.,* 474 U.S. at 525, 106 S.Ct. at 772.[4]

---

[4] In *State v. Hagen,* 802 P.2d 745, 747 (Utah,Ct.App.1990), the Utah Court of Appeals expressly relied on the collateral estoppel effect of *Ute Indian Tribe III* in holding that the state court lacked jurisdiction over the Indian defendants. Nevertheless, the Utah Supreme Court reversed, citing its earlier conclusion in the companion case of *State v. Perank,* 858 P.2d 927 (Utah 1992), but without further discussion of collateral estoppel. *Hagen,* 858 P.2d at 925-26. When *Hagen* reached the Supreme Court, the Court declined

In the situation before us, where the purposes of finality do not clearly support enforcement of either judgment, we might on the sole basis of our hierarchical system of courts prefer to give effect to the pronouncement of the Supreme Court. In an analogous context, for example, the D.C. Circuit stated that "[w]here, as here, a decision of the Supreme Court—the preeminent tribunal in our judicial system—departs in some pivotal aspects from those of lower federal courts, amendatory action may be in order to bring the pronouncements of the latter courts into line with the views of the former." *American Iron & Steel Inst.*, 560 F.2d at 596. We do not, however, take such "amendatory action" in this case merely on the basis of the incongruency between our decision in *Ute Indian Tribe III* and *Hagen*. Additional factors, including the importance of uniformity, also support our view that *Ute Indian Tribe III* should be modified in light of *Hagen*.

Uniformity is an important value in our system of judicial decisionmaking. While "[c]onflicts in the circuits are generally accepted and in some ways even welcomed," *Stauffer Chem. Co.*, 464 U.S. at 177, 104 S.Ct. at 582 (White, J., concurring), uniform decisionmaking within each circuit is essential. The related doctrines of collateral estoppel and stare decisis are exactly the sort of tools that have been designed to ensure uniformity and compliance with binding precedent. Like collateral estoppel, stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on

---

to address whether collateral estoppel barred relitigation of the boundary issue. *Hagen*, 510 U.S. at 409-10, 114 S.Ct. at 964-65. The Court relied on the procedural ground that counsel for the petitioner had failed to raise collateral estoppel in seeking a writ of *certiorari*. *Id.* The Court found "no reason to consider an argument that petitioner not only failed to raise but on which he expressly refused to rely in seeking a writ of *certiorari*." *Id.* at 410, 114 S.Ct. at 965. Accordingly, the Utah Supreme Court's ruling that collateral estoppel did not prevent relitigation of the boundary issue remains the settled judgment of that court.

judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed. 2d 720 (1991). Unfortunately, these doctrines have so far failed to prevent the inconsistency between *Ute Indian Tribe III* and *Hagen*. Given the important values that underlie these doctrines, we cannot allow such an inconsistency to persist.

More importantly, the lack of uniformity between *Ute Indian Tribe III* and *Hagen* presents a practical dilemma of daily importance. Although the Tribe continues to exercise civil and non-felony criminal jurisdiction on those portions of the Uintah Valley Reservation that were opened to settlement under the 1902-1905 allotment legislation, the State of Utah is solely responsible under *Hagen* for bringing felony prosecutions on the same lands. Often the difference between state and tribal jurisdiction is a matter of only a few dollars, the amount separating a misdemeanor from a felony in the case of theft, for example. Similar problems arise in determining whether an assault constitutes a misdemeanor subject to tribal and federal jurisdiction or whether it constitutes a felony subject to state jurisdiction. In this situaton, the interest of uniformity clearly supports modification of *Ute Indian Tribe III* and creation of a uniform allocation of jurisdiction. As the Third Circuit stated, " '[U]niformity' in application of principles and in decision-making might constitute a 'special reason for disturbing [the] repose and finality . . .' of an earlier adjudication." *American Iron & Steel Ins.*, 560 F.2d at 597 (quoting *Greater Boston Television Corp.*, 463 F.2d at 278-79).

Although a uniform allocation of jurisdiction would eliminate the existing confusion, we are mindful that "[f]inality must . . . delimit equality in a temporal sense, and we must accept as a fact that the argument for uniformity loses force over time." *James B. Beam Distilling*

Co., 501 U.S. at 542, 111 S.Ct. at 2447. As a limit on uniformity, finality is of particular importance where a change in law threatens to disrupt a final tort award or other settled judgment based on then-existing legal principles. The need for finality, however, applies with less force to judgments that are not "inherently final" but are rather of "a continuing nature." *American Iron & Steel Inst.*, 560 F.2d at 599. Where a prior erroneous judgment necessarily affects continuing conduct, the interests of uniformity may demand departure from the prior judgment to bring a court's view of the law into line with the prevailing view. *See Federal Labor Relations Auth. v. United States Dep't of Treasury*, 884 F.2d 1446, 1456 D.C. Cir. 1989) (concerning federal agencies' duty to disclose federal employees' names and addresses to labor unions); *American Iron and Steel*, 560 F.2d at 597-99 (concerning application of water pollution regulations); *Moch v. East Baton Rouge Parish School*, 548 F.2d 594 (5th Cir. 1997) (concerning apportionment of parish school board); *Christian v. Jemison*, 303 F.2d 52, 54-55 (1962) (concerning prohibition of racial segregation after abandonment of "separate but equal" doctrine); 18 CHARLES A. WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER. § 4415, at 131 (stating that "ordinary . . . preclusion rules are often strained by continuing conduct"). The character of *Ute Indian Tribe III* reflects this type of judgment. As the district court noted, the state and local defendants are not seeking "to unravel the intricate tapestry of individual judgments already made final each time a new decision is announced." *Ute Indian Tribe IV*, 935 F.Supp. at 1510. Instead, the defendants are seeking to apply *Hagen* prospectively to the continuing conduct of separate sovereigns and the individuals living in and around the Uintah Valley Reservation. This case does not involve the retroactive application of *Hagen* to events or lawsuits that have occurred in the past. To the extent that *Hagen* threatens to displace a judgment "on which reliance may reasonably have been

placed," *James B. Beam Distilling Co.*, 501 U.S. at 538, 111 S.Ct. at 2445, today's decision is limited to prospective application only. *See United States v. Cuch*, 79 F.3d 987, 995 (10th Cir.) (rejecting the retroactive application of *Hagen* to vacate a federal criminal conviction on collateral attack), *cert. denied*, —— U.S. ——, 117 S.Ct. 384, 136 L.Ed.2d 301 (1996).

The Tribe raises one final argument against modification of *Ute Indian Tribe III*. The Tribe contends that even if *Ute Indian Tribe III* does not continue to define the current boundaries of the Uintah Valley Reservation as between the State of Utah and criminal defendants under *Hagen*, the decision still should apply to legal relations between the state and local defendants and the Tribe. In effect, the Tribe urges us to adopt a dual jurisdictional system. Under such a system, *Ute Indian Tribe III* would control the allocation of authority among the named parties to this lawsuit in their dealings with each other, while *Hagen* would apply to the state and local defendants' relationships with all other parties. The Tribe contends that such a dual system is warranted because the state and local defendants, as full participants in *Ute Indian Tribe III*, are directly bound by our en banc decision, while the Tribe, as a nonparty to the litigaton in *Hagen*, is not directly bound by the Supreme Court's decision. Accordingly, the Tribe contends that the state and local defendants may properly assert jurisdiction over non-Indians within those portions of the original Uintah Valley Reservation that were open to settlement under the 1902-1905 legislation (the *Hagen*-based jurisdictional overlay). In their dealings with the Tribe and its members, however, the state and local defendants must recognize the authority of the Tribe and the federal government within those same portions of the Reservation (the *Ute Indian Tribe III*-based overlay).

We reject the Tribe's contention that jurisdiction must be allocated among the parties by two inconsistent bound-

ary determinations. The task of allocating jurisdiction necessarily involves line-drawing, and in an area where there is a compelling need for uniformity, there must be a single bright line. A dual system would only continue the confusion that has characterized the relationship between the parties since the issuance of *Hagen*. Under the Tribe's approach, for example, jurisdiction would depend not on the geographic locale of the crime or event at issue, but on the relationship between the State of Utah and the individual or entity over whom the State seeks to exercise jurisdiction. Rather than creating a stable allocation of jurisdiction where the parties' respective jurisdictions can be determined by reference to lines on a map, the Tribe's approach would introduce enormous uncertainty into an already complicated system. Each time the state and local defendants attempt to assert jurisdiction over a new party, whether to collect a tax or enforce a regulation, they would risk having to establish jurisdiction over that party through time-consuming and costly litigation. In addition, we question the propriety of allocating jurisdiction based on the application of procedural rules (*i.e.*, collateral estoppel and stare decisis) that were themselves designed to eliminate inconsistency and unpredictability. Further, the legal basis for the Tribe's dual jurisdictional scheme is undermined by our conclusion that the state and local defendants are not directly bound by *Ute Indian Tribe III*, at least as that decision conflicts with the contrary holding in *Hagen*.

For the reasons articulated above, we conclude that modification of our earlier judgment is appropriate, not merely because the two decisions are incongruent, but because of the effect of the incongruency on the interests of uniformity and the integrity of our system of judicial decisionmaking. We therefore hold that the judgment in *Ute Indian Tribe III* should be modified in light of the extraordinary circumstances presented in this case. To dispel any doubts, we emphasize the rarity that should attend the use of this remedy. "Because this Court or-

dinarily will view motions to recall a mandate with disfavor, the opinion in this matter should not be read as an invitation to litigants to seek review of already adjudicated claims." *American Iron & Steel Inst.*, 560 F.2d at 599.

We do not, however, recall *Ute Indian Tribe III* in its entirety. To the extent that *Ute Indian Tribe III* decided matters not addressed in *Hagen*, finality requires those decisions to remain undisturbed. Thus, we modify our earlier judgment only to the extent that it directly conflicts with the holding in *Hagen*. We next address the extent to which the two cases are in direct conflict.

III. Jurisdictional Boundaries After *Hagen*

In determining the parties' respective jurisdictional boundaries after *Hagen*, we begin by identifying the areas where *Ute Indian Tribe III* and *Hagen* are not in conflict and can be reconciled. To the extent that the boundary determinations made in the *Ute Indian Tribe III* do not directly conflict with *Hagen*, they remain in effect.

In *Ute Indian Tribe IV*, the 1996 district court opinion, the court fully addressed the areas of genuine conflict between *Ute Indian Tribe III* and *Hagen*. In large part, we need look no further than the district court's detailed opinion to determine those portions of the original Uintah Valley Reservation that remain the exclusive province of the Tribe and the federal government. *See Ute Indian Tribe IV*, 935 F. Supp. at 1485-1505. In sum, we agree with the district court that *Hagen* did not effectively overrule the entire judgment in *Ute Indian Tribe III*, including our holdings concerning the National Forest Lands and the Uncompahgre Reservation. Further, we agree that *Hagen's* only effect was to reduce (and not termintate) the boundaries of the Uintah Valley Reservation to the extent that lands within the Reservation were unallotted, opened for settlement under the 1902-1905 legislation, and not thereafter returned to

tribal ownership. Accordingly, we hold that our prior judgment in *Ute Indian Tribe III* should be, and is now, modified to the extent that lands within the original reservation boundaries were unallotted, opened to non-Indian settlement under the 1902-1905 legislation, and not thereafter returned to tribal ownership.[5]

A. The Uintah Valley Reservation, The Uncompahgre Reservation, and the National Forest Lands

In *Ute Indian Tribe III*, we decided three reservation diminishment issues. First, we concluded that the 1902-1905 allotment legislation did not have the effect of diminishing or disestablishing the Uintah Valley Reservation. *Ute Indian Tribe III*, 773 F.2d at 1089. Second, we concluded that the withdrawal of the National Forest Lands did not diminish the Uintah Valley Reservation. *Id.* at 1090. Finally, we held that the 1894 and 1897 allotment legislation did not diminish or disestablish the Uncompahgre Reservation. *Id.* at 1093.

Hagen dealt only with the first of these three issues. As the district court stated:

> *Hagen* determined "that the Uintah Indian Reservation has been diminished by Congress," *i.e.*, that the original boundary of the Uintah Valley Reservation does not currently define the present territorial extent of federal, state and tribal jurisdiction in the Uintah Basin.

Ute Indian Tribe IV, 935 F.Supp. at 1484 (citing *Hagen*, 510 U.S. at 419-21, 114 S.Ct. at 969-70). The district court continued:

> *Hagen* [did not] address the Tenth Circuit's determination in [*Ute Indian Tribe III*] that the 1905 na-

---

[5] Because we depart from a mandate of the en banc court and modify the earlier judgment in this case, we have circulated this opinion to the en banc court pursuant to our rules. Each member of the en banc court has concurred in our holding.

> tional forest withdrawals of approximately 1,010,000 acres of reservation land did not diminish the Uintah Reservation boundaries. *Hagen* also makes no ruling concerning the boundaries of the Uncompahgre Reservation, the original extent of which was reaffirmed by the Tenth Circuit.

Id. at 1485.

Although the state and local defendants admit that *Hagen* did not address the status of the Uncompahgre Reservation or the National Forest Lands, they assert that we should nevertheless recall our entire mandate in *Ute Indian Tribe III*. The defendants argue that *Hagen* effectively overruled the fundamental premise upon which the entire holding of *Ute Indian Tribe III* was based--namely, that statutory restoration language is insufficient to infer diminishment. They point out that in *Hagen* the Supreme Court stated that "restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status." 510 U.S. at 414, 114 S.Ct. at 967. The state and local defendants argue that in light of this statement, *Ute Indian Tribe III*'s holding concerning the National Forest Lands and the Uncompahgre Reservation cannot stand because the entire holding was based on a misreading of the same congressional restoration language that was at issue in *Hagen*.

Assuming that *Ute Indian Tribe III*'s holding with respect to the National Forest Lands and the Uncompahgre Reservation was based on a misreading of the applicable legislation, such a misreading alone is not sufficient to justify departing from our earlier judgment. As we stated earlier, our decision to modify *Ute Indian Tribe III* does not result from the desire to correct a prior erroneous judgment, but rather from the need to reconcile our decision with a directly conflicting decision of the Supreme Court. Because *Hagen* did not directly address our holding in *Ute Indian Tribe III* as it relates to the National

Forest Lands and the Uncompahgre Reservation, we have no reason to depart from that part of our prior judgment. We thus reject the defendants' contention that the judgment in *Ute Indian Tribe III* should be recalled in its entirety.

B. Non-Trust Lands Within the Original Boundaries of the Uintah Valley Reservation

Because we have concluded that *Hagen* did not address the status of the National Forest Lands or the Uncompahgre Reservation, we must now address the extent to which *Hagen* directly conflicts with *Ute Indian Tribe III*. In particular, we must decide which lands within the Uintah Valley Reservation are no longer Indian country after *Hagen*. The remaining controversy centers on whether the state and local defendants or the Tribe and the federal government have jurisdiction over the various categories of non-trust (*i.e., fee*), lands within the original boundaries of the Uintah Valley Reservation, whether held by Indians or non-Indians.

Under 18 U.S.C. § 1151, the Tribe and the federal government have civil and criminal jurisdictions over "Indian country." *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1540-41 (10th Cir. 1995). Indian country includes "all Indian allotments, the Indian titles to which have not been extinguished." 18 U.S.C. § 1151(c). This category constitutes lands held in trust by the federal government. Indian country also encompasses "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." 18 U.S.C. § 1151(a). Thus, Indian Country also includes all non-trust, or fee, lands so long as such lands are located within the "limits of any Indian reservation."

There are four categories of non-trust lands at issue in this case:

(a) lands that passed from trust to fee status pursuant to non-Indian settlement under the 1902-1905 allotment legislation;

(b) lands apportioned to the "Mixed Blood" Utes under the Ute Partition Act, Act of Aug. 27, 1954, Pub.L. No. 97-698, ch. 1009, 68 Stat. 868 (codified at 25 U.S.C. §§ 677-677aa);

(c) lands allotted to individual Indians that have passed into fee status after 1905; and

(d) lands that were held in trust after the Reservation was opened in 1905 but that since have been exchanged into fee status by the Tribe for then-fee (now trust) lands in an effort to consolidate its land holdings pursuant to the Indian Reorganization Act, Act of June 18, 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. §§ 461-79) and the Indian Land Consolidation Act of 1983, Pub.L. No. 97-459, 96 Stat. 2517 (codified at 25 U.S.C. §§ 2201-11).

See Ute Indian Tribe IV, 935 F.Supp. at 1484, 1486. In *Ute Indian Tribe III*, we held that the 1902-1905 allotment legislation did not have the effect of diminishing or disestablishing the Uintah Valley Reservation. We thus concluded that all of the non-trust lands identified above remained "Indian country" under § 1151(a) as lands within "the limits of any Indian reservation." In this case, we must determine the extent to which *Hagen* directly conflicts with our earlier conclusion that all of the above categories of non-trust lands remain within Indian country.

The parties do not dispute that *Hagen* directly conflicts with the first category of non-trust lands, those lands passing in fee to non-Indians pursuant to the 1902-1905 allotment legislation. This was precisely the category of fee lands at issue in *Hagen*. Accordingly, we modify our mandate in *Ute Indian Tribe III* and hold in accordance with *Hagen* that these lands are no longer within Indian

country under section 1151(a) subject to the jurisdiction of the Tribe and the federal government.

With respect to the other three categories of non-trust lands, the state and local defendants argue that these lands also are no longer within Indian country after *Hagen*. They contend that the Supreme Court in *Hagen* "clearly contemplated that the exterior boundaries of the Reservation would simply be gone." Appt. Brief, at 44. In other words, the defendants argue that the Court held that the 1902-1905 legislation completely terminated the Reservation such that no discrete, definable reservation boundaries now exist. Under the defendants' theory, there are no external boundaries and thus no "limits of any reservation." Indian country therefore is confined under § 1151(c) to "Indian allotments . . . which have not been extinguished," or trust lands. Under the theory that Indian country is limited to trust lands, the defendants argue that the three disputed categories of non-trust lands no longer constitute Indian country.

We reject the defendants' argument that *Hagen* removed all non-trust lands within the original Uintah Valley Reservation from Indian country. In *Hagen*, the Supreme Court did not decide that the 1902-1905 allotment legislation completely disestablished the Uintah Valley Reservation, erasing its outer boundaries and rendering § 1151(a) inapplicable to the three disputed categories of non-trust lands. The Court in *Hagen* stated:

> [W]e hold that the restoration of *unallotted reservation lands* to the public domain evidences a congressional intent *with respect to those lands* inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act *diminished* the reservation.

Hagen, 510 U.S. at 414, 114 S.Ct. at 967 (emphasis added). The Court stated that the Uintah Valley Reserva-

tion had been "diminished"—not "disestablished," "eliminated," or "terminated." Moreover, the diminishment was only "with respect to those lands" that had been restored to the public domain under the 1902-1905 legislation. *See Ute Indian Tribe IV*, 935 F.Supp. at 1487-88. We therefore conclude that *Hagen* did not erase the boundaries of the Uintah Valley Reservation and that the current "limits of [the] reservation" thus embrace the three categories of non-trust lands at issue. In sum, *Hagen* does not conflict with our holding in *Ute Indian Tribe III* that these categories of non-trust lands remain within Indian country under section 1151(a).

We note that this conclusion has the benefit of producing a stable, unchanging allocation of jurisdiction. Under our approach, the Tribe and the federal government retain jurisdiction over all trust lands, the National Forest Lands, the Uncompahgre Reservation, and the three categories of non-trust lands that remain within the boundaries of the Uintah Valley Reservation. The state and local defendants have jurisdiction over the fee lands removed from the Reservation under the 1902-1905 allotment legislation. Although a title search may be necessary to determine which lands were opened under the 1902-1905 legislation, the parties' respective jurisdictions will never change once the status of those lands is conclusively determined. By contrast, under the defendants' theory (*i.e.*, that Indian country is limited to trust lands) the Indian country status of land would change as trust lands are transferred into fee lands. We recognize that while our approach might result in a checkerboard allocation of jurisdiction, such a result is more desirable than the defendants' approach, which would produce a "moving checkerboard" because lands leaving trust status would also lose their status as Indian country.

In conclusion, we reject the argument that Indian country is confined to lands held in trust by the federal government under § 1151(e). Rather, Indian country extends to all trust lands, the National Forest Lands, the

Uncompahgre Reservation, and the three disputed categories of non-trust lands discussed above.[6]

CONCLUSION

For the foregoing reasons, we DENY the defendants' motion to recall our mandate in *Ute Indian Tribe III*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). Rather, we MODIFY our mandate in *Ute Indian Tribe III* as set out above and REMAND with instruction that the district court consider the Tribe's request for permanent injunctive relief in light of this opinion.

---

[6] We decline to address whether any portion of the non-trust lands opened in 1905 might still constitute Indian country under section 1151(b) as a "dependent Indian community" because that question is not properly before the court. The district court may be asked to consider the question upon remand.

APPENDIX B

UNITED STATES DISTRICT COURT
D. UTAH
CENTRAL DIVISION

No. 75-C-408J

UTE INDIAN TRIBE,
Plaintiff,

v.

STATE OF UTAH,
Defendant-in-Intervention.

and

DUCHESNE COUNTY, a political subdivision of the State of Utah; UINTAH COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; and DUCHESNE CITY, a municipal corporation,
Defendants.

April 2, 1996

MEMORANDUM OPINION AND ORDER

JENKINS, Senior District Judge.

On September 12, 1994, the above-captioned matter came on before this Court for a hearing on the merits. Robert S. Thompson, III, Esq., appeared on behalf of the plaintiff, the Ute Indian Tribe. John W. Andrews, Esq., and Michael M. Quealy, Esq., appeared on behalf of the

State of Utah. Herbert Wm. Gillespie, Esq.; Duchesne County Attorney, and Joann B. Stringham, Esq., Uintah County Attorney, accompanied by Tom Tobin, Esq., appeared on behalf of defendants Duchesne and Uintah Counties. Roland Uresk, Esq., appeared on behalf of defendant Duchesne City. Clark Allred, Esq., appeared on behalf of defendant Roosevelt City. Lauren N. Soll, Esq., United States Department of Justice, and Joseph Anderson, Esq., Assistant United States Attorney, appeared on behalf of the United States of America as *amicus curiae*, accompanied by William McConkie, Esq., United States Department of the Interior.

The pending motions revisit a subject explored in depth in this same litigation some time ago: the territorial extent of the Ute Indian Tribe's jurisdiction, at least as it may be delimited by the legal boundaries of the Uintah and Ouray Indian Reservation. That question was resolved among these parties by *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985) (en banc), *cert. denied*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986), resulting in a judgment that the Ute Indian Tribe now seeks to enforce in this court through entry of a permanent injunction. The State of Utah, defendants Duchesne and Uintah Counties, Duchesne City and defendant Roosevelt City (collectively, the "State and Local Defendants"), resist this, urging this court instead to disregard the Tenth Circuit's *en banc* ruling on appeal in this litigation in favor of redetermining the Ute reservation boundaries in light of the United States Supreme Court's more recent decision in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994). These defendants have also moved to dissolve the Order, entered by this court pursuant to stipulation of the parties on September 2, 1992, (nunc pro tunc to August 3, 1992), which was designed to preserve (more or less) the jurisdictional status quo pending the deter-

mination of the Ute Indian Tribe's Renewed Motion for Injunctive Relief.[1]

Background and Procedural History

As the Ute Indian Tribe explains in its brief, the promulgation in 1975 of the Ute Law and Order Code "raised immediate protests from the State of Utah and from the political subdivisions located within the original boundaries" of the Ute Reservation. Brief of Plaintiff Ute Indian Tribe in Opposition to Defendants' Motion to Dissolve Preliminary Injunction, filed July 15, 1994, at 2-3. "In the hope of establishing, once and for all, the exterior boundaries of the Reservation, and the geographic scope of the Tribe's jurisdiction, the Tribe filed [this] action for declaratory relief in this Court in 1975," joining Duchesne City and Roosevelt City as defendants. *Id.* at 3. The State of Utah intervened as a defendant and Uintah County was joined as a defendant by stiplation of the parties in the Pretrial Order. After conducting a trial on the merits and examining the pertinent legislation and historical materials in some detail, this court made an initial ruling defining the boundaries of the Uintah Valley Reservation and holding that the Uncompahgre Reservation had been disestablished. *See Ute Indian Tribe v. State of Utah,* 521 F.Supp. 1072 (D.Utah 1981). That determination was affirmed in part and reversed in part by a three-judge panel of the Tenth Circuit (716 F.2d 1298 (10th Cir. 1983)); the

[1] The September 2, 1992 Order was once modified "to allow the State and Local Defendants to prosecute felony crimes occurring on lands within the original boundaries of the Uintah Valley Reservation which are not 'Indian Country' as defined by 18 U.S.C. 1151, *et seq.*" Order, dated May 2, 1994, at 1-2. "In making this modification," however, this court was "not determining one way or another which lands may or may not constitute 'Indian Country,'" and the Order was entered "without prejudice to any claims of the parties as to the effect of the decision of the United States Supreme Court in *Hagen v. Utah*, or as to which lands may or may not constitute 'Indian Country.'" *Id.* at 2.

panel's decision in turn was affirmed in part and reversed in part on rehearing *en banc* (773 F.2d 1087 (10th Cir. 1985)). The United States Supreme Court denied certiorari (479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986)), and the Tenth Circuit issued its mandate pursuant to the *en banc* ruling, which was docketed by the Clerk of this court on December 9, 1986. Notice of receipt of the mandate was mailed to all counsel of record.

In its *en banc* ruling, the Tenth Circuit held that the Uintah Valley Reservation, created by Executive Order in 1861[2] and confirmed by Act of Congress in 1864,[3] had not been diminished by congressional legislation enacted from 1902 through 1905 opening unallotted and unreserved lands on the Reservation to entry under the homestead and townsite laws,[4] or by the inclusion of portions of the Reservation among lands withdrawn as national forest lands by Act of Congress and Presidential Proclamation in 1905.[5] 773 F.2d at 1088-1090; *see also id.* at 1099-1100 (Seymour, Holloway, McKay & Logan, JJ., concurring). The Tenth Circuit likewise held that the Uncompahgre Reservation had not been diminished by allotment legislation enacted in 1894 and 1897, which restored its unallotted lands "to the public domain" and opened them " 'for location and entry under all the land laws of the United States; . . .' " 773 F.2d at 1090-93 (quoting

---

[2] Executive Order 38-1 (reprinted in 1 Charles Kappler, *Indian Affairs: Laws and Treaties* 900 (1904)).

[3] Act of May 5, 1864, ch. 77, 13 Stat. 63.

[4] *See* Act of May 27, 1902, ch. 888, 32 Stat. 263; J.Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902); Act of March 3, 1903, ch. 994, 32 Stat. 998; Act of April 21, 1904, ch. 1402, 33 Stat. 207; Act of March 3, 1905, ch. 1479, 33 Stat. 1069. (The complete text of this legislation is reprinted in Appendix A to this court's initial memorandum opinion. *See* 521 F.Supp. at 1167-1174.)

[5] *See* Act of March 3, 1905, ch. 1479, 33 Stat. 1069; Proclamation of July 14, 1905, 34 Stat. 3116 (reprinted in 3 Charles Kappler *Indian Affairs: Laws and Treaties* 602-605 (1913)).

the Act of June 7, 1897, ch. 3, 30 Stat. 62, 87); *see also id.* at 1093-1099 (Seymour, Holloway, McKay & Logan, JJ., concurring).

The Tenth Circuit's *en banc* ruling closely followed the Supreme Court's decision in *Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984), decided 18 months earlier. Writing for a unanimous Court in *Solem*, Justice Thurgood Marshall concluded that the 1908 Act,[6] which authorized and directed the Secretary of the Interior "to sell and dispose of all that portion of the Cheyenne River and Standing Rock Indian reservations . . . lying and being within the following described boundaries, . . ." when "read as a whole, does not present an explicit expression of congressional intent to diminish the Cheyenne River Sioux Reservation." 465 U.S. at 476, 104 S.Ct. at 1169. Further, *Solem* held that "[n]either the Act of May 29, 1908, the circumstances surrounding its passage nor subsequent events clearly established that the Act diminished the Cheyenne River Sioux Reservation." 465 U.S. at 481, 104 S.Ct. at 1171. References in some sections of the 1908 Act to "the respective reservations thus diminished," [7] or to timber harvesting on the opened lands "only as long as the lands remain part of the public domain," [8] and even a few references in legislative materials to a "reduced reservation" or to lands reserved for the use of the Indians on both reservations as diminished," did not add up to a clear expression of congressional intent to diminsh either reservation. *Id.* at 474-78, 104 S.Ct. at 1168-70. Importantly, the contemporary and subsequent legislative history of the opening of the Cheyenne River Reservation reflected ambiguities similar to those appearing in the record in *Ute Indian Tribe:* "examples pointing in both directions leave one with the distinct impression that subsequent Congresses had no clear view whether the

---

[6] Act of May 29, 1908, ch. 218, § 1, 35 Stat. 460, 460-61.

[7] *Id.* at § 2, 35 Stat. 461.

[8] *Id.* at § 9, 35 Stat. 464.

opened territories were or were not still part of the Cheyenne River Reservation." *Id.* at 479, 104 S.Ct. at 1170.

Relying explicitly on *Solem*, the Tenth Circuit in *Ute Indian Tribe* reasoned:

> The 1902 Act would have returned all surplus Uintah Reservation lands to the public domain if the Ute Tribe's consent could be obtained. That consent was never forthcoming. The Tribe refused all requests to give up their lands. As a result of the impasse, Congress passed additional legislation in 1902 and 1904 extending the time set for opening of the Reservation. . . . Finally, Congress passed the 1905 Act, opening the Reservation for non-Indian settlement under the homestead and townsite laws. This measure, which actually effected the opening of the Reservation, did not contain the public domain language used in the 1902 Act.
>
> It is not possible to find that the series of congressional enactments summarized above revealed a "baseline purpose of disestablishment," . . . that carried through into the 1905 Act. To do so is inconsistent with the Supreme Court's longstanding directive, reiterated in *Solem*, that in the absence of "substantial and compelling evidence of a congressional intention to diminish Indian lands," the courts' "traditional solicitude for the Indian tribes" must compel a finding that "the old reservation boundaries survived the opening." [465 U.S. at 472,] 104 S.Ct. at 1167. It is impossible to draw disestablishment conclusions or inferences from these congressional statements.
>
> An examination of the 1902-1905 series of congressional enactments with the proper "solicitude for the Indian tribes," *Solem*, [465 U.S. at 472,] 104 S.Ct. at 1167, provides inferences against diminishment. . . . The strongest inferences that is to be

> drawn from Congress' actions is that Congress wished surplus Uintah Reservation lands to be put to productive use. . . .

773 F.2d at 1089 (citations omitted). "Congress' use of 'homestead and township acts' language in the 1905 Act, as contrasted with its use of 'public domain language' in the 1902 Act," the Tenth Circuit concluded, "is evidence of a clear retreat from any desire to effect a wholesale diminishment of the Reservation." *Id.* (footnote omitted).

After requesting and receiving a brief from the Solicitor General of the United States concerning the issues presented (478 U.S. 1002, 106 S.Ct. 3291, 92 L.Ed.2d 707 (1986)), the United States Supreme Court denied certiorari on December 1, 1986. *Utah v. Ute Indian Tribe,* 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986) (mem.).

The State of Utah, not content simply to abide by the Tenth Circuit's judgment in this action (in which it plainly had participated as a party), found opportunity to relitigate the boundary issue in three criminal actions commenced and prosecuted in its name in the Utah state courts. These cases, *State of Utah v. Perank,*[9] *State of Utah v. Coando,*[10] and *State of Utah v. Hagen,*[11] arose in

---

[9] 858 P.2d 927 (Utah 1992). In defending a state probation revocation proceeding in 1986, Clinton Perank raised the question of jurisdiction based upon the *Ute Indian Tribe* decision. Although "[a]ppellate jurisdiction would ordinarily lie with the Utah Court of Appeals," the *Perank* opinion noted that "[b]ecause of the importance of the question presented, the Court of Appeals certified the case to this Court." *Perank,* 858 P.2d at 930 n. 1.

[10] 784 P.2d 1228, 1229 (Utah Ct.App.1989) ("The State argues that notwithstanding the *Ute Indian Tribe* decision, Roosevelt is not in Indian country. . . ."), *affirmed,* 858 P.2d 926 (Utah 1992). In *Coando,* the Utah Supreme Court granted certiorari review "to determine whether that court correctly upheld the state's exercise of jurisdiction"—notwithstanding the fact that the Utah Court of Appeals did not reach either the "Indian country" issue or the question whether Coando was an enrolled tribal member—and

the Uintah Basin communities of Myton and Roosevelt and involved neither the Ute Indian Tribe nor any of its enrolled tribal members. In one of the three cases, *State v. Perank,* the Utah Supreme Court invited both the Ute Indian Tribe and the United States to file *amicus curiae* briefs, which both did.[12] In none of these cases was the Ute Tribe joined as a party.

On July 17, 1992, the Utah Supreme Court issued opinions in *Perank, Coando* and *Hagen.* Justice Stewart's opinion for the majority in *Perank* announced that court's conclusion that the boundaries of the Uintah Valley Reservation had been diminished, such that the town of Myton was no longer within "Indian country," and elaborated at some length on the majority's reasoning in reaching that result. *See Perank,* 858 P.2d at 933-953.

Almost immediately, the Ute Indian Tribe filed a renewed motion before this court seeking preliminary injunctive relief against any assertion of jurisdiction by the defendants in reliance on the *Perank* decision. Though the motion was fully briefed by the parties and calendared for hearing on August 3, 1992, it was not ruled upon at that

---

affirmed Coando's conviction in light of *State v. Perank,* decided the same day, which held that Myton, Utah is not "Indian country." Justice Durham noted that in doing so, "[w]e therefore affirm his conviction on grounds other than those upon which the court of appeals relied." 858 P.2d at 927.

[11] 802 P.2d 745, 747 (Utah Ct.App.1990) ("While we have not been acquainted with the precise arguments advanced by the state in *Perank,* we are hard-pressed to see how, given the Supremacy clause and the doctrine of collateral estoppel, our state courts could reach a contrary decision that would have any practical effect."), *reversed,* 858 P.2d 925 (Utah 1992).

[12] In the *Perank* opinion, the Utah Supreme Court noted that the Justice Department filed a copy of the brief originally filed in opposition to the petition for writ of certiorari in the *Ute Indian Tribe* case following the Tenth Circuit's 1985 *en banc* ruling. The brief filed by the Ute Tribe apparently addressed only the threshold question whether defendant Perank was an "Indian" for purposes of 18 U.S.C. § 1151. 858 P.2d at 930-31.

time. By stipulation signed by all of the parties to this action, it was agreed that the State and Local Defendants would "refrain from enforcing the Utah Supreme Court's decision in *State v. Perank*, [858 P.2d 927,] No. 8602433 [sic] (Utah July 17, 1992)," and would refrain from exercising criminal jurisdiction over Indians who are members of the Indian Tribe or any other federally recognized Indian Tribe," as well as "civil jurisdiction over actions involving the Ute Indian Tribe or members of the Ute Indian Tribe, or interfering, in any way, with the Tribe's exercise of such civil or criminal jurisdiction within the exterior boundaries of the Uintah and Ouray Reservation, Utah," as those boundaries were defined by the Tenth Circuit in *Ute Indian Tribe*. The parties also agreed that the Ute Indian Tribe "shall exercise criminal jurisdiction over Indians who are members of the Ute Indian Tribe or any other federally recognized Indian Tribe" and that the Tribe would "exercise civil and regulatory jurisdiction over Indians and non-Indians to the extent permitted by law within the exterior boundaries" as defined by *Ute Indian Tribe*. This court simply ordered that "the parties shall comply with the provisions of said stipulation," pending this court's ruling on the merits of the Tribe's renewed motion for injunctive relief. Order, dated September 2, 1992, (*nunc pro tunc* to August 3, 1992).

The hearing on the Tribe's renewed motion was reset for December 22, 1992, then rescheduled for April 14, 1993, in light of the filing of a petition for certiorari in the *Hagen* case, (*see* Order, dated December 17, 1992), and again reset to June 18, 1993, after the Solicitor General of the United States filed a brief regarding the certiorari petition. *See* Order, dated March 26, 1993. Upon the grant of certiorari by the Supreme Court in the *Hagen* case, this court stayed further proceedings in this action pending the outcome of that appeal. *See* Order, dated April 29, 1993.[18]

[18] The State of Utah also filed motions before the Utah Supreme Court to stay issuance of that court's remittitur in the *Perank*,

On February 23, 1994, the United States Supreme Court announced its decision in *Hagen*, holding that the Uintah Valley Reservation had been diminished by Congress when its unallotted and unreserved lands were "opened" to non-Indian settlers pursuant to the 1902 Act, and therefore, that Myton, Utah was not within "Indian country" within the meaning of 18 U.S.C. § 1151 (1988 ed.). *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994).

The announcement of the *Hagen* decision provoked a flurry of motion practice in this proceeding. The State and Local Defendants filed a motion to dissolve the September 2, 1992 Order of this court preserving the jurisdictional status quo, and then on April 27, 1994, a "Motion for Emergency Relief" concerning the exercise of criminal jurisdiction, which was calendared for hearing on May 2, 1994.[14] Following that hearing, this court entered an Order modifying the September 2, 1992 Order "to allow the State and Local Defendants to prosecute felony crimes occurring on lands within the original boundaries of the Uintah Valley Reservation which are not "Indian country" as defined by 18 U.S.C. § 1151, *et seq.*" Order, dated May 2, 1994. At the May 2, 1994 hearing, this court scheduled a hearing on all pending motions for June 7, 1994, which was continued at the request of the parties until August 2,

---

Coando and *Hagen* cases, which was granted "pending (1) the conclusion of any proceedings on certiorari in the United States Supreme Court . . . and (2) the final disposition of the injunction proceeding pending in the United States District Court for the District of Utah, *Ute Indian Tribe v. State of Utah, et al.*, [521 F.Supp. 1072,] Civil No. C75-408. Until this Court lifts the stay, the decision in *State v. Perank*, . . . shall not be relied on as precedent by any lower court." *Perank*, 858 P.2d at 930 (Utah 1993).

[14] This motion was filed shortly after the Supreme Court's denial of a petition for rehearing in *Hagen*. *See Hagen v. Utah*, —— U.S. ——, 114 S.Ct. 1580, 128 L.Ed.2d 222 (1994).

1994, with briefs to be filed during July.[15] On July 15, 1994, the Tribe filed its Brief of Plaintiff Ute Indian Tribe in Opposition to Defendants' Motion to Dissolve Preliminary Injunction ("Brief of Ute Indian Tribe");[16] on July 26, 1994, the defendants filed the State and Local Defendants' Memorandum for Injuctive Relief ("Defendants' Memorandum");[17] and on July 29, 1994, the Government filed the United States' Memorandum as *Amicus Curiae* in Response to the State of Utah's Motion to Vacate and Set Aside the Preliminary Injunction ("United States' Memorandum").[18]

At the request of counsel, the August 2, 1994 hearing was conducted as a status or pretrial conference, at which

---

[15] Upon an informal request by counsel, the matter was again set down for a status conference on July 14, 1994, but no one appeared. *See* Minute Entry, dated July 14, 1994.

[16] Previously, the Tribe had filed its Brief in Support of Permanent Injuntcion, dated September 25, 1992, as well as the Tribe's Reply Brief in Support of Permanent Injunction, filed December 17, 1992, both of which predate *Hagen*. Counsel for the Tribe submitted additional materials by Letter, dated September 1, 1994, including the slip opinion in *Chickasaw Nation v. Oklahoma ex rel. Oklahoma Tax Comm'n*, 31 F.3d 964 (10th Cir.1994) and a memorandum opinion prepared by the Regional Solicitor, U.S. Department of the Interior, dated July 7, 1994, concerning the impact of *Hagen* on federal, state and tribal jurisdiction within the Uintah Basin.

[17] While the State and Local Defendants filed no memorandum accompanying their Motion to Vacate and Set Aside Preliminary Injunction and to Dismiss Plaintiff's Motion for Permanent Injunctive Relief, dated April 25, 1994, they had filed several prior memoranda, including the State and Local Defendants' Response in Opposition to the Tribe's Request for Permanent Injunction, dated November 23, 1992, and the State and Local Defendants' Reply to the *Amicus Curiae* Memorandum of the United States, dated December 11, 1992.

[18] The Government had also filed a prior Memorandum as *Amicus Curiae* in Support of Ute Indian Tribe's Motion for Injunctive Relief, dated November 23, 1992.

time this court set a hearing on the merits for September 12, 1994, with the proposed pretrial order to be prepared and submitted by counsel on or before August 12, 1994. *See* Minute Entry, dated August 2, 1994.[19] By stipulation of counsel, the time for filing the proposed pretrial order was extended to August 19, 1994. *See* Order, dated August 22, 1994. The proposed Pretrial Order Concerning "Indian Country" Issues was received on August 19, 1994, signed by the court on September 9, and entered on September 12, 1994, prior to the hearing on the merits.

At the September 12, 1994 hearing, arguments of counsel on the legal issues outlined in the Pretrial Order were heard at length. *See* Transcript of Hearing, dated September 12, 1994, *passim*. Noting that "with the added gloss on what was done early on, the effort to mesh those into something that makes sense, is obviously something that will require some effort," this court took the matter under advisement. *Id.* at 72:19-22.[20]

---

[19] At that time, counsel for Roosevelt City made what amounted to a "speaking motion" for immediate relief from the court's September 2, 1992 Order as modified by the May 2, 1994 Order, on the theory that "it is acknowledged by the Ute Tribe and the United States and all the parties here that Roosevelt City is no longr within Indian country." Transcript of Hearing, dated August 2, 1994, at 24:17-20. Roosevelt City having filed no formal request for immediate relief, this court made no formal ruling at that time.

[20] Since that time, several individual Indian criminal defendants whose offense conduct occurred within "Indian country" as delineated in *Ute Indian Tribe* have filed motions for relief pursuant to 28 U.S.C. § 2255 (1994). In *United States v. Cuch*, 875 F.Supp. 767 (D.Utah 1995), Judge Sam ruled that the governing law concerning jurisdiction over defendant Cuch at the time of his conviction was the Tenth Circuit's *en banc* ruling in *Ute Indian Tribe* and that the *Hagen* decision did not apply retroactively to alter that result. The Tenth Circuit's decision in *Cuch*, announced March 21, 1996, affirms Judge Sam's ruling and sheds some additional light on the Tenth Circuit's reading of *Ute Indian Tribe* after *Hagen*, particularly as it pertains to cases decided before *Hagen*. More about that later. . . .

Issue Now Before This Court

At the outset, it seems worthwhile to define the particular issue or issues now in dispute, and to do so with some care. In approaching the questions raised by the parties' motions, this court has read and reread *Hagen* with some care. *Hagen* determined "that the Uintah Indian Reservation has been diminished by Congress," *i.e.*, that the original boundary of the Uintah Valley Reservation does *not* currently define the present territorial extent of federal, state and tribal jurisdiction in the Uintah Basin. 510 U.S. at 419-21, 114 S.Ct. at 970. However, the *Hagen* opinion makes no attempt to define with particularity what the current boundary *is*.

The Pretrial Order Concerning "Indian Country" Issues ("Pretrial Order"), prepared by counsel and entered by the court on September 12, 1994, identifies, *inter alia*, the following issues as currently being in dispute:

> A. In spite of *Hagen*, are the State and Local Defendants precluded as a matter of law or equity under the doctrine of collateral estoppel or otherwise, from asserting jurisdiction over the Tribe or its members within the exterior boundaries of the Uintah and Ouray Reservation, as those boundaries were defined in *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. den.* 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986)?
>
> B. Although the U.S. Supreme Court denied the Tribe leave to intervene as a party in *Hagen*, is the Supreme Court's decision binding on the Tribe and its members in this action under the doctrine of *stare decisis* or otherwise?
>
> C. In light of *Hagen*, do any or all of the following categories of fee land constitute "Indian Country" under 18 U.S.C. § 1151: (a) land that was apportioned to the "Mixed-Blood" Utes under the Ute Partition Act; (b) lands allotted to individual

> Indians that have passed into fee status after 1905; and (c) lands that were held in trust after the Reservation was opened in 1905 but that since have been exchanged into fee status by the Tribe for then-fee (now trust) lands in an effort to consolidate its land holdings[?]

Id. at 14-15. Before reaching the issues addressed in Paragraphs 5.A and 5.B of the Pretrial Order, it makes sense to examine to what extent the decision of the United States Supreme Court in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), stands in genuine conflict with the Tenth Circuit's *en banc* ruling in *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). The res judicata, collateral estoppel or other binding effect of the Tenth Circuit's judgment in *Ute Indian Tribe* comes into question in this proceeding only insofar as *Ute Indian Tribe* and *Hagen* cannot be reconciled. The land category issues identified in Paragraph 5.C of the Pretrial Order would also appear to be subsumed within this more fundamental question.

The Uintah Reservation Boundaries After *Hagen*

Let us begin with those questions as to which *Ute Indian Tribe* and *Hagen* are in accord—those issues which are *not* in dispute. First, there is no question that the jurisdiction of the Ute Indian Tribe encompasses all of the lands now held in trust by the United States for the benefit of the Tribe and its members, or where Indian allotments are concerned, lands now held in trust for the benefit of individual Ute allottees. *See* Pretrial Order Concerning "Indian Country" Issues, dated September 12, 1994, at 13 ¶ 3.M. Altogether, this represents approximately 1.2 million acres of land. Nor did *Hagen* address the Tenth Circuit's determination in *Ute Indian Tribe* that the 1905 national forest withdrawals of approximately 1,010,000 acres of reservation land did not diminish the

Uintah Reservation boundaries. *Hagen* also makes no ruling concerning the boundaries of the Uncompahgre Reservation, the original extent of which was reaffirmed by the Tenth Circuit. The Ute Indian Tribe suggests that "the legal status of the non-opened lands on the Uintah Valley Reservation and all of the lands on the Uncompahgre Reservation remain[s] as established by the Tenth Circuit in *Ute Indian Tribe v. Utah*, 773 F.2d 1087 (10th Cir. 1985), *cert. denied*, 479 U.S. 994[, 107 S.Ct. 596, 93 L.Ed.2d 596] (1986)." Brief of Ute Indian Tribe, at 2 n. 4; *see id.* at 15 n. 19. *Accord, State of Utah v. Perank*, 858 P.2d 927, 934 (Utah 1992).

The present controversy thus "centers on whether the State or the Tribe and federal government have jurisdiction over the various categories of *non-trust*, i.e., fee, lands within the Uintah Valley Reservation," (Brief of Ute Indian Tribe at 15 (emphasis added & footnote omitted)), and therefore concerns the extent to which *Hagen* supplants *Ute Indian Tribe*'s reaffirmation of continuing federal and tribal jurisdiction within the Reservation's original exterior boundaries.

The United States, appearing in this proceeding as an *amicus curiae*, attempts to minimize the practical impact of *Hagen* on the jurisdictional landscape mapped in *Ute Indian Tribe:* because the 1905 Act expressly provided that the "unallotted lands . . . shall be disposed of under the general provisions of the homestead and townsite laws of the United States," the reservation was diminished only to the extent of the lands "actually entered by non-Indians under the 1905 Act and not subsequently reacquired by the Tribe and taken into trust status." United States' Memorandum, dated July 29, 1994, at 9. Moreover, "any parcels of land, though currently held in fee, that were never opened to non-Indian settlement under the 1905 Act remain 'Indian country'." *Id.* at 13.[21]

---

[21] According to the Government, "This category includes those fee lands that were initially Indian allotments that have become

The Tribe joins the Government in asserting that *Hagen*'s "only effect is to separate from 'Indian country' those lands that were *actually settled* pursuant to the 1905 Presidential Proclamation," noting that "the present disagreement centers on whether the State or the Tribe and federal government have jurisdiction over the various categories of non-trust, i.e., fee, lands within the Uintah Valley Reservation." Brief of Ute Indian Tribe at 13, 15 (emphasis added). The Tribe identifies four categories of non-trust land within the Reservation:

> (1) lands that passed from trust to fee status under the 1905 Presidential Proclamation; (2) lands that were initially allotted to tribal members under the Act of May 27, 1902, ch. 888, 32 Stat. 245, which have since passed into fee status (whether owned by an Indian or non-Indian); (3) 211,430 acres of land . . . that were distributed to former members of the Tribe under the Ute Partition Act . . .; and (4) former trust lands that passed into fee when they were exchanged by the Tribe for fee lands under the Indian Reorganization Act . . . and [the] Indian Land Consolidation Act. . . .

Id. at 16 (citations omitted). According to the Tribe, only the first category of non-trust lands are no longer "Indian country" within the meaning of 18 U.S.C.A. § 1151 (1984). The Tribe even points to language in the Utah Supreme Court's opinion in *Perank* as support for this view: " 'The only issue in this case . . . is whether the unallotted and unreserved lands that *were opened to entry in 1905* and not later restored to tribal ownership and jurisdiction . . . are within the present boundaries of the Reservation.' " *Id.* at 18 (quoting *Perank*, 858 P.2d at 934 (emphasis supplied by the Tribe; footnote omitted)).

---

fee under a number of circumstances, as well as those lands that were distributed in fee status to former members of the Tribe or others under the Ute Partition Act, 25 U.S.C. §§ 677-677aa." *Id.*

Setting aside for a moment the semantic distinction between lands that "were opened to entry" under the 1905 Act (*Perank*) and lands that were "actually settled" (Tribe), the Tribe correctly points out that on their facts, both *Perank* and *Hagen* addressed conduct occurring in Myton, Utah, "which was established within the original boundaries of the Uintah Indian Reservation when the Reservation was opened to non-Indian settlement in 1905." *Hagen*, 510 U.S. at 408, 114 S.Ct. at 964. Indeed, Myton was established by Presidential Proclamation, together with the towns of Duchesne and Randlett. *See* 34 Stat. 3139, 3142. Plats of the Reserved Townsite of Myton were approved on September 13, 1905, by the United States General Land Office and on August 26, 1919, by the United States Surveyor General.[22] Thus Myton comes within the first category of non-trust lands listed by the Tribe, at least as to lands patented in fee, and in its entirety as lands "opened to entry" under *Perank*.

"Indian country" within the meaning of 18 U.S.C.A. § 1151(a) (1984) encompasses "all land within the limits of any Indian reservation under the jurisdiction of the United States Government, notwithstanding the issuance of any patent, and including rights-of-way running through the reservation." Thus, non-trust, or fee lands may be found within "Indian country" so long as there are identifiable "limits of any Indian reservation" embracing those lands.[23] Neither *Hagen* nor *Perank* determined the "Indian country" status of non-trust lands falling into any of the other three categories listed by the Tribe, or in Paragraph 5.C of the Pretrial Order because

---

[22] *See* Defendants' Memorandum at 25 n. 19.

[23] As the Tenth Circuit has recently observed, "both the Supreme Court and this Court have concluded § 1151 defines Indian country for both civil and criminal jurisdiction purposes." *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1540-1541 & n. 10 (10th Cir.1995).

neither case involved conduct occurring on those lands. The Tribe and the United States suggest that the three remaining categories of non-trust lands not before the Court in *Hagen* remain "Indian country" because they are within the Uintah Reservation's "limits" for purposes of § 1151(a).

The State and Local Defendants emphatically dispute the theory advanced by the Tribe and by the United States: "If the boundaries *were* diminished, then it was recognized by all involved that tribal jurisdiction necessarily was limited to trust lands. . . . Once this diminishment of the exterior boundaries occurred, lands leaving trust status for any reason lost their status as 'Indian country' under 18 U.S.C. § 1151(a)." Defendants' Memorandum at 12 (emphasis in original).[24] In essence, the State and Local Defendants now argue that the Uintah Reservation was wholly terminated or extinguished by the 1902 Act and that thereafter no discrete, definable reservation boundaries exist. For purposes of § 1151(a), then, the only existing "limits" of the Uintah Reservation after 1905 are those that distinguish Indian lands held in trust from Indian and non-Indian lands held in fee. Indeed, this " 'Indian country' equals trust lands" equation represents the central thrust of the Defendants' arguments in this proceeding.

The Uintah Reservation: "Diminished" or "Terminated"?

As is so often the case, the problem confounding court and counsel proves to be largely one of semantics. When

[24] The defendants hasten to point out that in addressing the question before the Supreme Court in *Hagen*, both the petitioner and the Tribe argued that a finding of "diminishment" would divest the Tribe and the United States of jurisdiction over the non-trust lands. *Id.* at 13-14. This would indeed be the case had the Court found *the entire reservation* to have been "disestablished," or "terminated," as in *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975).

Hagen speaks of the "question whether the Uintah Reservation has been *diminished*," that is, "made smaller; lessened; reduced . . ." (*Webster's New World Dictionary* 386 (3d coll. ed. 1991)), the terminology itself implies a continued existence, albeit reduced in size, according to commonly understood usage. In essence, the Tribe and the United States argue that the limits of the Uintah Reservation have been "diminished" by being reduced only to the extent of issuance of fee patents resulting from non-Indian settlement under the 1905 Act. Conversely, the State and Local Defendants argue that the limits of the Uintah Reservation have been "diminished," that is, *extinguished*, rendering § 1151(a) inapplicable to all four disputed categories of non-trust lands. The concept urged by the State and Local Defendants may more accurately be termed the *disestablishment* of a reservation, *i.e.*, "to deprive of the status of being established," (*id.* at 393), or its *termination*, *i.e.*, "the end of something in space and time," (*id.* at 1381), rather than a genuine diminishment. *See also Ute Indian Tribe*, 521 F.Supp. at 1085-1092.[25]

Yet when winnowed down to its precise holding, *Hagen* says this:

> [W]e hold that the restoration of unallotted reservation lands to the public domain evidences a congressional intent with respect to those lands inconsistent with the continuation of reservation status. Thus, the existence of such language in the operative section of a surplus land Act indicates that the Act diminished the reservation. . . .

---

[25] The word *terminate* has also been used in this context. *See, e.g., Mattz v. Arnett*, 412 U.S. 481, 495, 93 S.Ct. 2245, 2253, 37 L.Ed.2d 92 (1973) ("A congressional determination to terminate [a reservation] must be expressed on the face of the Act or be clear from the surrounding circumstances and legislative history."); *DeCoteau v. District County Court*, 420 U.S. 425, 444-45, 95 S.Ct. 1082, 1092-93, 43 L.Ed.2d 300 (1975) ("the Lake Traverse Reservation was terminated in 1891").

510 U.S. at 414, 114 S.Ct. at 967.[26] Thus, the discontinuation of reservation status, or "diminishment" of the Reservation, was effective *"with respect to those lands,"* plainly referring to the "unallotted reservation lands," the lands restored to the public domain and "opened to entry" and settlement pursuant to the 1902-1905 Acts.

Justice O'Connor's phrasing of the holding in *Hagen* parallels Justice Stewart's framing of the statutory construction issue in *Perank:* "whether the language of the Act of May 27, 1902, which provided that the unallotted lands were to be 'restored to the public domain,' if used as operative statutory language opening a reservation

---

[26] The State and Local Defendants quote the next sentence of the *Hagen* opinion, supplying emphasis as indicated:

> Indeed, we have found only one case in which a Federal Court of Appeals decided that statutory restoration language did not *terminate* a reservation, *Ute Indian Tribe*, 773 F.2d at 1092, a conclusion the Tenth Circuit has since disavowed as "unexamined and unsupported." *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387, 1400, *cert. denied*, 498 U.S. 1012, 111 S.Ct. 581, 112 L.Ed.2d 586 (1990).

Defendants' Memorandum at 16 (quoting *Hagen*, 510 U.S. at 414, 114 S.Ct. at 967). Of course, Justice O'Connor is citing to the portion of *Ute Indian Tribe* opinion discussing the restoration of the *Uncompahgre Reservation* to the public domain in the 1894 and 1897 Acts—not the opening of the Uintah Reservation in 1905. *Compare* 773 F.2d at 1090-1093 ("III. THE UNCOMPAHGRE RESERVATION") *with id.* at 1088-1089 ("II. THE UINTAH ISSUE"). Likewise, the reference in *Yazzie* to the "unexamined and unsupported" conclusion in *Ute Indian Tribe* concerns only the 1985 ruling as to the Uncompahgre Reservation. *Yazzie* recounts the analysis of the opening of the Uintah Reservation in favorable terms, restating its conclusion that "restoration language was not the operative language of the statute being construed," *viz.*, the 1905 Act. *Yazzie*, 909 F.2d at 1399-1400.

This distinction is also lost upon Wendy L. Slater, *"Pulling up the Nails" from the Uintah Indian Reservation Boundary: Hagen v. Utah*, 28 CREIGHTON L.REV. 529, 546 (1995) ("The court noted that its decision in *Ute* was 'unexamined and unsupported in the opinion.' " (footnote omitted)).

would effect a diminishment of that reservation *as to the lands so restored.*" 858 P.2d at 934 (emphasis added). Justice Stewart articulated the court's holding in *Perank* in like terms: "We hold that the restoration language in the 1902 Act established the necessary congressional intent to diminish the Reservation *as to those lands restored to the public domain* and that the restoration language in the 1902 Act remained operative statutory language when the Reservation was opened in 1905." *Id.* (emphasis added).

As this court noted when first addressing the boundary issue in 1981, there exists a canon of statutory construction in reservation boundary cases "forbidding any assumption 'that Congress would intend to change the reservation to an area without defined boundaries and, in addition, create a confusing checkerboard pattern of jurisdiction.' " *Ute Indian Tribe,* 521 F.Supp. at 1154 (quoting *United States v. Long Elk,* 565 F.2d 1032, 1039 (8th Cir.1977)). Yet the State and Local Defendants suggest that in construing the 1905 Act opening the Uintah Reservation in *Hagen,* the Supreme Court assumed exactly that.

Nothing in the legislation pertaining to the Uintah Reservation expresses a congressional purpose to extinguish or terminate the Uintah Reservation in its entirety. Rather, Congress expressly provided that the Utes would retain more reservation land than merely their individual allotments. As *Hagen* explains, "A month after the passage of the 1902 Act, Congress directed the Secretary of the Interior to set apart sufficient land to serve the grazing needs of the Indians remaining on the Reservation. J.Res. 31, 57th Cong., 1st Sess. (1902), 32 Stat. 744." 510 U.S. at 404, 114 S.Ct. at 962 (footnote omitted). In Congress' own words, the Secretary was directed to "select and set apart for the use in common of the Indians of that reservation such an amount of non-irrigable grazing lands therein at one or more places as will subserve the reasonable requirements of said Indians for the grazing of live

stock." In 1903, Congress again addressed the reservation grazing lands, limiting the selection to "the lands south of the Strawberry River on said Uintah Reservation" and providing that the lands "shall not exceed two hundred and fifty thousand acres. . . ." Act of March 3, 1903, ch. 994, 32 Stat. 998. The 1905 Act "repealed the provision of the 1903 Act limiting the grazing lands to areas south of the Strawberry River," (*Hagen*, 510 U.S. at 406, 114 S.Ct. at 963), leaving the reserved grazing lands requirement otherwise intact. Act of March 3, 1905, ch. 1479, 33 Stat. 1069. Thus, in the opening legislation affecting the Uintah Reservation, Congress visualized an "unopened" portion of the Reservation consisting not only of individual Indian allotments but also of a quarter-million acres of grazing land "for the use in common of the Indians of that reservation." [27] Even the oft-quoted 1903 "councils" of Indian Inspector James McLaughlin with the Utes residing on the Uintah Reservation acknowledge this:

> [INSPECTOR McLAUGHLIN]: You say that [reservation boundary] line is very heavy and that the reservation is nailed down upon the border. That is very true as applying to the past many years and up to now, but [C]ongress has provided legislation which will pull up the nails which hold down that line and after next year there will be no outside boundary line to this reservation. *Each of you will have a boundary to your individual holdings and there will also be a border to that 250,000 acre tract set apart for pasturage.* You fear that you are going to be confined to the tract of land allotted. That is not so, . . . [W]hen you take your allotments you can travel

---

[27] In *Perank*, Justice Stewart noted that "[t]he allotments to individual Indians under the 1902 Act and the lands reserved for grazing and other purposes set aside for the Tribe by a 1902 Joint Resolution and the 1903 and 1905 Acts make up approximately 360,000 acres." 858 P.2d at 934 n. 10.

> like white men and you will not need a pass. *Your Agency will be continued just the same as now; the Agent will have full jurisdiction just the same as now, to protect your interests,* and as citizens you will have the protection of the laws of the state to redress injuries against you.

JX 162 at 42-45 (emphasis added) (quoted in Brief for the Respondent, *Hagen v. Utah,* 1993 WL 384805, at Appendix C, at 5a-6a).

Nowhere in *Hagen* or *Perank* does either court find that the Uintah Reservation was "disestablished" or "terminated" altogether or conclude, as the Supreme Court did twenty years earlier in *DeCoteau*, that "the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs" and that the reservation itself was terminated. 420 U.S. at 446, 95 S.Ct. at 1094. To the contrary Justice Stewart observed in *Perank* that "all parties agree that *the Uintah Reservation, as a political entity, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use.*" 858 P.2d at 934 (emphasis added). Thus the Uintah Reservation, though dramatically reduced in size, continued to exist after 1905 as an Indian reservation with definable "limits" within the meaning of 18 U.S.C. § 1151(a), and the lands encompassed by its diminished boundaries remain within "Indian country" under the statute.

Judge Monroe McKay, writing for the court of appeals in *Chickasaw Nation v. State ex rel. Oklahoma Tax Comm'n,* 31 F.3d 964 (10th Cir.1994), *affirmed in part, reversed in part on other grounds and remanded,* —— U.S. ——, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995), expressed this same view:

> In *Hagen,* the Court concluded that the Uintah reservation had been "diminished" by various acts of Congress, and that therefore a town originally within the

> reservation was now outside the reservation and subject to state criminal jurisdiction. Notwithstanding the diminishment of the Uintah reservation in *Hagen*, there was no question but that *the land within the diminished reservation retained its status as Indian country*.

31 F.3d at 976 n. 8 (emphasis added).[28] Even more recently, in *United States v. Cuch*, 79 F.3d 987 (10th

---

[28] The State of Utah argues that *Chickasaw Nation* in fact ratifies its "Indian country-equals-trust lands" equation and that Judge McKay's reference to "land within the diminished reservation" speaks only of trust lands—wholly consistent with the State's theory of wholesale disestablishment. *See* Transcript of Hearing, September 12, 1994, at 20:14-21:12 (Mr. Andrews).

Judge McKay's opinion echoes the Supreme Court's holding in *Oklahoma Tax Comm'n v. Sac and Fox Nation*, 508 U.S. 114, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993), that the limits imposed by *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 93 S.Ct. 1257, 36 L.Ed.2d 129 (1973), and its progeny upon a state's power to tax the income of tribal members "applies to all Indian country, and not just formal reservations," and that the crucial question is "whether the relevant tribal members live in Indian country—whether the land is within reservation boundaries, on allotted lands, or in dependent communities." 508 U.S. at 125, 126, 113 S.Ct. at 1991, 1992. *Sac and Fox* to tax, citing *Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), a case involving Indian tribal trust lands located outside of a formal reservation. *Id.* at 124-25, 113 S.Ct. at 1991. "Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, . . ." *Sac and Fox, Id.* at 123, 113 S.Ct. at 1990.

Indian Country, U.S.A. v. Oklahoma Tax Comm'n, 829 F.2d 967 (10th Cir.1987), *cert. denied*, 487 U.S. 1218, 108 S.Ct. 2870, 101 L.Ed.2d 906 (1988), expressly equates "reservation" lands with "[T]ribal lands, trust lands, or certain allotted lands," with reference to their common status as "Indian country" under 18 U.S.C. § 1151. Nothing in *Indian Country, U.S.A.* asserts that "reservation" or "Indian country" status under 18 U.S.C. § 1151(a) is dependent on or limited by Indian title or trust status. Nor does it suggest that once Indian tribal or trust land acquires "Indian country" status under § 1151(a), subsequent "issuance of any patent"

Cir.1996), the Tenth Circuit described the effect of *Hagen* in these terms: "[t]he *Hagen* decision effectively overruled the contrary conclusion reached in the *Ute Indian Tribe* case, *redefined the Reservation boundaries* resulting from our earlier decision, and conclusively settled the question." *Cuch*, 79 F.3d at 989 (emphasis added). Judge Stephen Anderson, writing for the court of appeals in *Cuch*, reads *Hagen* as holding that "the state had jurisdiction to prosecute Hagen because Congress had diminished the Uintah Reservation in the early 1900s." *Id.* In this context, *diminishment* "redefined the Reservation boundaries" previously established in *Ute Indian Tribe*, but with no indication that the Uintah Reservation was terminated or disestablished altogether.

In this respect, *Rosebud Sioux Tribe v. Kneip* also proves instructive. In *Rosebud*, the Court speaks of a reservation *diminished* (430 U.S. at 585, 586, 587, 588, 594, 598, 611, 614, 97 S.Ct. at 1362, 1362, 1363, 1363, 1367, 1369, 1375, 1377), of the *diminution* of a reservation by restoration of "opened" unallotted lands (*id.* at 592 597, 602, 97 S.Ct. at 1366, 1368, 1371), of the *disestablishment* of a particular county "from the Rosebud Reservation," (*id.* at 601, 603, 609, 97 S.Ct. at 1370, 1371, 1374), of congressional intent "to exclude Gregory County from the Rosebud Reservation," (*id.* at 603, 97

---

in fee to § 1151(a) lands somehow divests the patented lands of "Indian country" status.

In footnote 8 of *Chickasaw*, Judge McKay quoted the *Indian Country, U.S.A.* opinion for the proposition that "[t]ribal lands, trust lands, and certain allotted lands generally remain Indian country despite disestablishment." 829 F.2d at 975 n. 3 (Seymour, J.). In then observing that under *Hagen* "the land within the diminished reservation retained its status as Indian country," this court reads Judge McKay to be referring to land within *an existing reservation* "[n]otwithstanding the diminishment." Footnote 8 thus distinguishes "the diminished reservation" from "[t]ribal lands, trust lands, and certain allotted lands" following "disestablishment," rather than equating the two.

S.Ct. at 1371), or "to disestablish the affected [opened, unallotted] areas." *Id.* at 613, 97 S.Ct. at 1376. At page 599, 97 S.Ct. at page 1369 of the *Rosebud* opinion, the Court notes that "[h]ere, for example, unlike the situation in *DeCoteau,* we are not faced with an Act which, if it disestablished the area under question, *would terminate the entire reservation,* 420 U.S., at 446-447, [95 S.Ct., at 1094]." *Id.* at 599 n. 20, 97 S.Ct. at 1369 n. 20 (emphasis added).[29]

---

[29] The distinction between *DeCoteau* and *Rosebud* in this regard has been pointed out by the Eighth Circuit:

> The Indian conduct in *DeCoteau* did occur on non-Indian, unallotted land within the 1867 reservation boundaries. *DeCoteau v. District County Court, supra,* 420 U.S. at 428, 95 S.Ct. at 1082. However, the Supreme Court also concluded that as to this particular land, reservation status had been terminated by the Congressional Act of March 3, 1891, c. 543, 26 Stat. 1035. *DeCoteau v. District County Court, supra,* 420 U.S. at 444-445, 95 S.Ct. 1082. Appellant cites no statute similarly disestablishing the reservation status of Todd County in the Rosebud Reservation.
>
> . . . .
>
> Judge Blackmun in the first *Beardslee* appellate opinion concluded from his research that "(o)nly three Acts of Congress have affected the territory of the reservation since its establishment in 1889 and none of these concern Todd County. * * * No part of the Todd County portion of the reservation has ever been formally opened." *Id.* at 285. Similarly last year in *Rosebud Sioux Tribe v. Kneip,* 521 F.2d 87 (8th Cir.1975), cert. granted, [425] U.S. [989], 96 S.Ct. 2199, 48 L.Ed.2d 814 (1976), where the court dealt with the South Dakota counties of Gregory, Tripp, Lyman, and Mellette, it also added that: "Todd County remains unopened." *Id.* at 88 n. 1 (emphasis added).

Beardslee v. United States, 541 F.2d 705, 707, 708 (8th Cir.1976). *See also, United States v. Long Elk,* 565 F.2d 1032, 1037, 1038 (8th Cir.1977) (*Rosebud* concluded that "Congress clearly intended to diminish the size of the Rosebud Reservation" and "disestablished the designated portions of the reservation"); *United States ex rel. Cook v. Parkinson,* 525 F.2d 120, 123 (8th Cir.1975) ("[t]he phrase 'diminished reservation' was interpreted [by the Eighth

Rosebud concluded that the language of the Act of April 23, 1904, ch. 1484, 33 Stat. 254, the Act of March 2, 1907, ch. 2536, 34 Stat. 1230, and the Act of May 30, 1910, ch. 260, 36 Stat. 448, affecting the Rosebud Reservation "not only opened the land for settlement, but diminished the boundaries of the Reservation *pro tanto*." 430 U.S. at 588, 97 S.Ct. at 1363 (footnote omitted).[30] "The intent of Congress in the 1904, the 1907, and the 1910 Acts was *to change the boundaries of the original 1889 Rosebud Reservation*." *Id.* at 615, 97 S.Ct. at 1377 (emphasis added).

Rosebud illustrates the fact that reservation diminishment is not necessarily the either-or, all-or-nothing, win-or-lose proposition asserted in this proceeding by the State and Local Defendants. In referring to the Uintah Reservation as being *diminished* "with respect to those [unallotted and unreserved] lands," *Hagen* uses the term in the commonly understood sense of being "made smaller, lessened or reduced," as the Court did in *Rosebud*. *See also White Earth Band of Chippewa Indians v. Alexander*, 518 F. Supp. 527, 534 (D.Minn.1981) (White Earth Chippewa Reservation diminished by cession of four-township tract; remaining thirty-two township reservation area not disestablished), *affirmed*, 683 F.2d 1129 (8th Cir. 1982), *cert. denied*, 459 U.S. 1070, 103 S.Ct. 488, 74 L.Ed.2d 631 (1982).

Hagen also contrasts with *Pittsburg & Midway Coal Mining Co. v. Yazzie*, 909 F.2d 1387 (10th Cir.), *cert.*

Circuit] to mean in *Rosebud* that the reservation was reduced geographically"); *Black Hills Institute v. United States Department of Justice*, 812 F.Supp. 1015, 1019 (D.S.D.1993) ("*Rosebud* was a case involving congressional intent as to the disestablishment *of a part of the reservation*" (emphasis added)).

[30] *pro tanta*—"a defensible Latinism commonly used in the law" meaning "to that extent; as far as it goes." BRYAN A. GARNER. A DICTIONARY OF MODERN LEGAL USAGE 708 (2d ed. 1995). *Accord*, BLACK'S LAW DICTIONARY 1100 (5th ed. 1979) ("for so much; for as much as may be; as far as it goes.")

denied, 498 U.S. 1012, 111 S.Ct. 581, 112 L.Ed.2d 586 (1990), in which the court of appeals found that the reservation status of a 1907-08 addition to the Navajo Reservation was terminated by language in a 1908 Act as well as 1908 and 1911 Executive Orders which restored the unallotted lands to the public domain. Finding that the 1907-08 "reservation" had been made by Executive Order for the limited purpose of providing allotments to individual Indians, the Tenth Circuit explained: "Especially when a reservation addition is made only for the limited purpose of allotments of some of the land to individual Indians in severalty, the reservation is terminated when the lands are allotted and the remainder restored to the public domain." 909 F.2d at 1420. Therefore, having been made for that limited purpose, the 1907-08 addition to the Navajo Reservation was entirely "*unlike cases where reservation status was created by treaty or statute, or by EO for purposes broader than mere allotments in severalty*," (*id.* (emphasis added))—cases such as the Uintah Reservation, created by Executive Order in 1861 and Act of Congress in 1864 and "set apart for the permanent settlement and exclusive occupation of such of the different tribes of Indians of said territory as may be induced to inhabit the same." Act of May 5, 1864, ch. 77, § 2, 13 Stat. 63. Nothing in *Yazzie* even hints that the termination of the 1907-08 addition affected the boundaries of the remainder of the Navajo Reservation in any way whatsoever.

The 1902-1905 Acts were not the first time that the Uintah Valley Reservation had been diminished by a restoration of particular lands to the public domain. Section 1 of the Act of May 24, 1888, ch. 310, 25 Stat. 157, declared a 7,040-acre parcel known as the Gilsonite Strip "to be public lands of the United States and restored to the public domain." It was clearly understood at that time that the restoration of the Gilsonite Strip to the public domain represented a diminishment of the Reservation.[31]

---

[31] A November 18, 1895 letter from the Commissioner of Indian Affairs to the Secretary of the Interior commented that the 1888

It was equally plain that the balance of the Reservation not so restored remained intact as a reservation. *See Ute Indian Tribe*, 521 F.Supp. at 1098-1100.

The view expressed in *Perank* that "the Uintah Reservation, as a political entity, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use," corresponds with subsequent congressional treatment of the matter, including references in legislative materials to "the exterior boundary of the Uintah and Ouray Reservation." *See Ute Indian Tribe*, 521 F.Supp. at 1133-1134. Moreover, the boundaries of the Uintah Reservation, though reduced in 1905, were not then frozen in place; they became the subject of further legislative adjustments. *See Perank*, 858 P.2d at 934 & n. 10.

In the aftermath of the demise of the Indian allotment policy, Congress and the United States Department of the Interior have taken steps to restore thousands of acres of vacant "opened" lands to the Reservation. Section 3 of the Wheeler-Howard Act, or Indian Reorganization Act of 1934,[32] 25 U.S.C.A. §463 (Supp.1996), reads in part:

> [t]he Secretary of the Interior, if he shall find it to be in the public interest, is authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States,

provided that valid existing claims are not affected. On August 25, 1945, Secretary of the Interior Harold Ickes issued an Order of Restoration directing that the "undis-

---

Act "had been fully executed in accordance with its intent so far as the securing of the consent of the Indians to *the diminution of their reservation* and the restoration of said strip of land to the public domain, . . ." *Ute Indian Tribe*, 521 F.Supp. at 1100 (emphasis added).

[32] Act of June 18, 1934, ch. 576, 48 Stat. 984.

posed-of opened lands of the Uintah and Ouray Reservation . . . are hereby restored to tribal ownership for the use and benefit of the Ute Indian Tribe . . ., and *are added to and made a part of the existing reservation*, subject to any valid existing rights." 10 Fed.Reg. 12409 (1945) (emphasis added).[33] Further, the Act of March 11, 1948, ch. 108, 62 Stat. 72, expressly provided that "the exterior boundary of the Uintah and Ouray Reservation . . . for the benefit of the Ute Indian Tribe of the Uintah and Ouray Reservation, is hereby extended to include the following area: . . .," followed by a lengthy legal description encompassing an area of grazing lands known as the Hill Creek Extension.

If, as the State and Local Defendants now suggest, the "Uintah and Ouray Reservation" consists merely of an aggregation of parcels of Indian trust lands, why did Congress speak of extending the Reservation's "exterior boundary"? Congress in 1948 was aware of the distinction. Three months after extending the Reservation boundaries to embrace the Hill Creek Extension, "Congress uncouple[d] reservation status from Indian ownership, and statutorily define[d] Indian country to include lands held

---

[33] As acknowledged by the parties in this proceeding, "Regardless of whether the original reservation was diminished, . . . opened lands that have been restored to reservation status by subsequent Acts of Congress, see *e.g.*, Indian Reorganization Act of 1934, ch. 576, 48 Stat. 984 (codified at 25 U.S.C. § 461 *et seq.* (1982 ed.) (authorizing the return of opened lands to the original reservations)), fall within the exclusive criminal jurisdiction of federal and tribal courts under 18 U.S.C. §§ 1152, 1153." *Solem*, 465 U.S. at 467 n. 8, 104 S.Ct. at 1164 n. 8.

Similarly, the 1983 panel opinion in *Ute Indian Tribe*, referring to the 1945 Order of Restoration, observed: "Neither party disputes that the restorations accomplished pursuant to § 463 of 25 U.S.C. made them part of the reservation. We agree. This restoration included about 217,000 acres." 716 F.2d 1298, 1312-1313 (10th Cir. 1983) (Seth, C.J.). *Accord*, *Perank*, 858 P.2d at 950 ("[T]he return of those lands to the reservation would enlarge the boundaries of the reservation. *See Solem*, 465 U.S., at 467-68, [104 S.Ct. at 1164,] . . .").

in fee by non-Indians within reservation boundaries. *See* Act of June 25, 1948, ch. 645, 62 Stat. 757 (codified at 18 U.S.C. § 1151 (1982 ed.))." *Solem*, 465 U.S. at 468, 104 S.Ct. at 1164.

The State and Local Defendants' contention that *Hagen* leaves the Uintah Valley portion of the Uintah and Ouray Reservation "an area without defined boundaries" cannot survive careful scrutiny of the operative language of the 1902 Act and subsequent legislation, particularly when read in light of the explicit holding of the *Hagen* case, buttressed by the consistent language of the *Perank* opinion. Because "the Uintah Reservation, as a political entity, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use," and also as to lands later restored to the Reservation by congressional or administrative action (*see Perank*, 858 P.2d at 934), the State and Local Defendants' simplistic " 'Indian country'-equals-trust lands" equation cannot accurately define the jurisidctional landscape of the Uintah Reservation, even as diminished.[34] Other cases involving terminated or wholly disestablished reservations having only scattered allotments remaining (*e.g., DeCoteau, Yazzie*) are simply inapposite to the case at bar.

---

[34] Particularly as to tribal lands held in trust, the defendants' assertion that "Indian country" status ends "when lands leave trust status" (Defendants' Memorandum at 20) appears to repudiate the express terms of the statute, 18 U.S.C. § 1151(a), in favor of earlier definitions under which "Indian country" included "only those lands in which the Indians held some form of property interest. . . ." (*Solem*, 465 U.S. at 468, 104 S.Ct. at 1164), and where land continued to be Indian country "so long as the Indians had the title to it, and no longer." *Bates v. Clerk*, 95 U.S. 204, 208, 24 L.Ed. 471 (1877). As the Court pointed out in *Solem*, Congress "uncouple[d] reservation status from Indian ownership" by enacting 18 U.S.C. § 1151(a) in 1948. 465 U.S. at 468, 104 S.Ct. at 1164. As to lands held by the United States in trust for a tribe, the court can find no authority suggesting that a finding of diminishment alters the language or effect of § 1151(a) in any way. *See* pages 1498-1500 *infra*.

Extent of the 1905 Diminishment of the Uintah Reservation

In *Perank*, Justice Stewart wrote, "The only issue in this case . . . is whether the unallotted and unreserved lands that were opened to entry in 1905 and not later restored to tribal ownership and jurisdiction by the 1945 'Order of Restoration' are within the present boundaries of the Reservation, (858 P.2d at 934)—which brings us back to the distinction between lands "opened to entry in 1905" and opened lands "actually settled" under the 1905 Act.

The narrower reading proffered by the Tribe and the United States as to the effect of *Hagen*—lands "actually settled" under the 1905 Act—harmonizes with this court's original treatment of the 1905 Act, *viz.*, as legislation having some substantive effect *vis-a-vis* the 1902 Act. *See Ute Indian Tribe*, 521 F.Supp. at 1123-1132. It strikes a more dissonant chord when contrasted with the reading given the 1905 Act in the *Hagen* and *Perank* opinions. Both *Hagen* and *Perank* read the 1902 Act as restoring *all* unalloted and otherwise unreserved lands within the Uintah Reservation to the public domain. Further, both *Hagan* and *Perank* read the 1905 Act as making no substantive change in the operation of restoration language of the 1902 Act.[35] Indeed, it is on this precise point that

---

[35] The *Hagen* majority limits the effect of the 1905 Act by minimizing its purpose: "[A]lthough we have no way of knowing for sure why the Senate decided to limit the 'manner' of opening, it seems likely that Congress wanted to limit land speculation. That objective is not inconsistent with the restoration of the unallotted lands to the public domain. . . ." 114 S.Ct. at 969. As this court observed the first time around. Senator Henry M. Teller of Colorado, a leading architect of the Senate language adopted in the 1905 Act, "had long opposed the allotment of Indian lands and *wholesale opening of reservations to white settlement under the allotment* bills, charging that such legislation was in the interests of non-Indian land speculators." *Ute Indian Tribe*, 521 F.Supp. at 1131 (emphasis added; citations & footnote omitted). Concerning an earlier Indian allotment bill, Senator Teller remarked:

> This is a bill that, in my judgment, ought to be entitled "A bill to despoil the Indians of these lands and to make them

Perank and *Ute Indian Tribe* disagree, and the United States Supreme Court granted certiorari in *Hagen* expressly "to resolve the direct conflict between these decisions of the Tenth Circuit and the Utah Supreme Court on the question whether the Uintah Reservation has been diminished." 510 U.S. at 409, 114 S.Ct. at 964.

Through and including *Hagen*, the Supreme Court's line of reservation boundary cases invoke two rules of statutory construction: that "the statutory language must 'establis[h] an express congressional purpose to diminish,'" (510 U.S. at 411, 114 S.Ct. at 965 (quoting *Solem*, 465 U.S. at 475, 104 S.Ct. at 1168), and that "[t]roughout the inquiry, we resolve any ambiguities in favor of the Indians, and we will not lightly find diminishment." *Id.* (citing *Solem*, 465 U.S. at 470, 472, 104 S.Ct. at 1166, 1167) *Hagen* quotes *South Dakota v. Bourland*, 508 U.S. 679, 687, 113 S.Ct. 2309, 2316, 124 L.Ed.2d 606

---

vagabonds on the face of the earth," because in my view, that is the result of this kind of legislation.

11 Cong.Rec. 934 (Jan. 20, 1881) (remarks of Sen. Teller).

Ironically, By relying on its own limiting assumptions concerning congressional purpose, the *Hagen* majority reads the 1905 Act as providing in effect that "so much of said lands *as will be under the provisions of said acts restored to the public domain* shall be open to settlement and entry" under the homestead and townsite laws—precisely the language of the House bill rejected by Congress in 1905 in favor of the Senate version, which deliberately omitted the public domain language. *See* 114 S.Ct. at 979-980 (Blackmun, J., dissenting); *see also Ute Indian Tribe*, 521 F.Supp. at 1127-1132 & nn. 168-173A.

Nevertheless, having once determined that the 1905 Act did not alter the effect of the restoration language found in the 1902 Act and that the 1902 Act—not the 1905 Act—operated to diminish the Reservation, it seems doubtful at best that the *Hagen* majority would turn to the 1905 Act rather than the 1902 Act to define the territorial extent of that same diminishment. The specific tracts which were in fact entered and "settled" under the 1905 Act would thus be subsumed within the broader congressional directive that "all the unallotted lands within said reservation shall be restored to the public domain." Act of May 27, 1902, ch. 888, 32 Stat. 263.

(1993), which in turn quotes *County of Yakima v. Confederated Tribes and Bands of the Yakima Nation*, 502 U.S. 251, 112 S.Ct. 683, 116 L.Ed.2d 687 (1992), for the broader proposition that " '[S]tatutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.' " 502 U.S. at 269, 112 S.Ct. at 693 (quoting *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766, 105 S.Ct. 2399, 2403, 85 L.Ed.2d 753 (1985)).

When contrasted with the Court's disposition of substantive issues affecting Indians in its more recent cases, however, it remains unclear how much substantive impact these lofty expressions really have.[36] Indeed, the new interpretive "canon" articulated in *Hagen, viz.*, that legislation affecting Indian reservations should not be construed in such a fashion as "would seriously disrupt the justifiable expectations of the [non-Indian] people living in the area," 510 U.S. at 421, 114 S.Ct. at 970.[37] seems to rewrite the

---

[36] Of course, reliance on "canons of construction" as presaging a particular substantive result always proves to be somewhat problematic. *See, e.g.*, Karl N. Llewellyn, *Remarks of the Theory of Appellate Decision and the Rules or Canons about How Statutes Are to Be Construed*, 3 VAND.L.REV. 395 (1950) ("Plainly, to make any canon take hold in a particular instance, the construction contended for must be sold, essentially by means other than the use of the canon. . . ."). The canons themselves may simply represent shorthand expressions of more fundamental values, policies and perceptions as to institutional role. *See, e.g.*, William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV.L.REV. 26 (1994), *and generally* HORACE E. READ, JOHN W. MCDONALD, JEFFERSON B. FORDHAM & WILLIAM J. PIERCE, MATERIALS ON LEGISLATION 744-948 (4th ed. 1982).

[37] Using a *"Cf."* signal, the majority opinion cites only to *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 604-605, 97 S.Ct. 1361, 1372, 51 L.Ed.2d 660 (1977), as authority supporting this interpretive principle. The *"Cf."* signal denotes that the cited authority *"supports a proposition different from the main proposition but sufficiently analogous to lend support."* HARVARD LAW REVIEW ASSOCIATION, ET AL., THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION 23 (15th ed. 1991) (emphasis in original). The referenced pages of the

traditional principle that " 'doubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith," [38] so as to give greater deference to the Tribe's more numerous non-Indian neighbors than to the Indians themselves.[39] *See also* Lauren N. Soll, *The Only Good*

Rosebud opinion point to "the unquestioned actual assumption of state jurisdiction over the unallotted lands . . . since the passage of the 1904 Act" (430 U.S. at 603) as evidence corroborating a finding of reservation diminishment:

> The long-standing assumption of jurisdiction by the State over an area that is over 90% non-Indian, both in population and in land use, not only demonstrates the parties' understanding of the meaning of the Act, but has created justifiable expectations which should not be upset by so strained a reading of the Acts of Congress as petitioner urges.

430 U.S. at 604-05, 97 S.Ct. at 1372 (footnote omitted). *Rosebud* itself does not identify whose "justifiable expectations" are referenced.

Hagen further observes that "[w]e have recognized that '[w]hen an area is predominantly populated by non-Indians with only a few surviving pockets of Indian allotments, finding that the land remains Indian country seriously burdens the administration of state and local governments.' " 510 U.S. at 420-21, 114 S.Ct. at 970 (quoting *Solem*, 465 U.S. at 471-472 n. 12, 104 S.Ct. at 1166-67 n. 12). Of course, the burdens on federal and tribal agencies of administering "jurisdiction dependent on the tract book" following a finding of diminishment—most recently typified by the issues pending in this proceeding—have also been acknowledged. *See, e.g., Solem*, 465 U.S. at 472 n. 12, 104 S.Ct. at 1167 n. 12 ("Conversely, problems of an imbalanced checkerboard jurisdiction arise if a largely Indian opened area is found to be outside Indian country. See *Seymour v. Superintendent*, 368 U.S., at 358[, 82 S.Ct., at 428]"); *DeCoteau v. District County Court*, 420 U.S. 425, 466-67, 95 S.Ct. 1082, 1103, 43 L.Ed.2d 300 (1975) (Douglas, J., dissenting).

[38] *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 586, 97 S.Ct. 1361, 1362, 51 L.Ed.2d 660 (1977) (quoting *Carpenter v. Shaw*, 280 U.S. 363, 367, 50 S.Ct. 121, 122, 74 L.Ed. 478 (1930)).

[39] *See also* William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV.L.REV. at 62 & n. 159 ("As statutes evolve, the text loses some of its focal power, and other

Indian Reservation is a Diminished Reservation? The New and Diluted Canons of Construction in Indian Law, 41 FED.B.NEWS & J. 544 (1994); Robert Laurence, *the Unseemly Nature of Reservation Diminishment by Judicial, as Opposed to Legislative, Fiat and the Ironic Role of the Indian Civil Rights Act in Limiting Both*, 71 N.D.L. REV. 393 (1995).

Putting aside the metaphysics of interpretive canons, *Hagen*, particularly when read in tandem with *Perank*, leads to the conclusion that when speaking of "diminishment" under the 1902-1905 Acts, the Court was referring to the restoration of *all unallotted and unreserved lands* to the public domain. Consequently, it seems doubtful that a majority of the United States Supreme Court would adopt the narrower construction of the 1902 and 1905 Acts now urged by the Government and the Tribe, limiting the 1905 "diminishment" in the first instance to only those fee lands "actually settled" in the manner prescribed

---

considerations become increasingly important in statutory interpretation—the purpose of the law, the surrounding legal terrain, and statutory precedents. The 1993 Term [of the Supreme Court] was replete with cases invoking these evolutive considerations." (footnotes omitted) (citing "Hagen v. Utah, [510 U.S. 399, 414-21,] 114 S.Ct. 958, 967-70[, 127 L.Ed.2d 252] (1994) (O'Connor, J.) (subsequent legislative signals and private interpretation); . . .").

Though largely taking *Hagen* and the *Hagen-Perank* criticism of *Ute Indian Tribe* at face value, Wendy L. Slater, *"Pulling up the Nails from the Uintah Indian Reservation Boundary*: Hagen v. Utah, 28 CREIGHTON L.REV. 529 (1995), criticizes *Hagen*'s use of current demographics: "In its reliance on a demographic profile of the Reservation ninety years after its opening, the Court weakened its position, tainting its otherwise credible and well-supported analysis. . . . The Court should not have weighed the merits of retaining the Reservation by examining modern circumstances, but instead should have considered only the practical consequences which reflected congressional intent at the time the Reservation was opened for settlement. In simple terms, the power to discontinue reservation status lies with Congress and not with the Court." *Id.* at 555-56 (footnotes omitted).

in the 1905 Act.[40] *See generally*, Robert Laurence, *supra;* Ralph W. Johnson & Berrie Martinis, *Chief Justice Rehnquist and the Indian Cases*, 16 PUB.LAND. L.REV. 1 (1995); James Grijalva, et al., *Diminishment of Indian Reservations: Legislative or Judicial Fiat?* (Panel Discussion), 71 N.D.L.REV. 415 (1995); Alex Tallchief Skibine, *Removing Race Sensitive Issue from the Political Forum or Using the Judiciary to Implicitly Take Someone's Country*, 20 J.CONTEMP.L. 1 (1994).

Hagen, though on its facts only deciding the "Indian country" status of Myton, Utah, effectively determined that the Uintah Reservation was diminished to the extent of the unallotted and unreserved lands that were opened to entry in 1905. To the extent that those lands were not later restored to tribal ownership and jurisdiction by sub-

---

[40] Noting that Roosevelt City "was not settled under the townsite provisions of the 1905 Presidential Proclamation," the Tribe asserts that "[o]nly if it is determined that the City was settled on former homesteaded lands, a determination which cannot be made absent a title search, would the State have jurisdiction within Roosevelt City." Brief of Ute Indian Tribe at 22 n. 23. At the same time, the Tribe acknowledges that the status of Roosevelt was of some "concern to the Supreme Court in *Hagen*, *see* [510 U.S. at 420-21,] 114 S.Ct. at 970." *Id.* Under this court's reading of *Hagen*, the more pertinent question is whether Roosevelt City is found within the unallotted and unreserved lands "opened" to entry and settlement in 1905. If so, absent some subsequent legislative or administrative act returning all or part of its lands to the Reservation, Roosevelt City lies outside of "Indian country" under 18 U.S.C. § 1151(a).

In the "Brief of Defendant Roosevelt City in Support of Defendant's Motion to Vacate and Set-Aside Preliminary Injunction and to Dismiss Plaintiff's Motion for Permanent Injunctive Relief," filed July 26, 1994, counsel offers what may best be characterized as an informal, generalized proffer of evidence bearing upon land tenure in Roosevelt based upon unidentified land record documents showing Roosevelt to be built entirely on "opened" unallotted lands. *Id.* at 3. Beyond that, other than expressing Roosevelt City's obvious impatience with not having the immediate, unfettered power to do as it pleases, its Brief sheds little additional light on the legal issues now before the court in this proceeding.

sequent congressional administrative action, they ceased to have reservation status in 1905 and are no longer found within "Indian country" within the meaning of 18 U.S.C.A. § 1151 (1984).[41] To that extent, *Hagen* stands in direct conflict with the Tenth Circuit's *en banc* ruling in *Ute Indian Tribe*, which held that all lands within the original exterior boundary of the Uintah Reservation remain within "Indian country" under the statute. At the same time, the Uintah Reservation, as an entity, continued to exist after 1905 as to allotted and reserved lands not "opened" and as to lands later restored to the reservation by Congress or the Department of the Interior, the return of which "would enlarge the boundaries of the reservation." *Perank*, 858 P.2d at 950 (citing *Solem*, 465 U.S. at 467-468, 104 S.Ct. at 1164). Thus, "Notwithstanding the diminishment of the Uintah reservation in *Hagen*, there was no question but that the land within the diminished reservation retained its status as Indian country." *Chickasaw Nation v. State ex re. Oklahoma Tax Comm'n*, 31 F.3d at 976 n. 8.

Categories of Non-Trust Lands Now in Dispute

The three categories of non-trust, or fee lands identified in Paragraph 5.C of the Pre-trial Order involve tracts that either were never located within the area of "opened lands" diminishment under *Hagen* or are tracts of "opened lands" which at some point were returned to tribal owner-

---

[41] As the Tenth Circuit recently noted, " '[F]ederal courts "are bound by the Supreme Court's considered dicta almost as firmly as by the Court's outright holdings, particularly when . . . [the dicta] is of recent vintage and not enfeebled by any [later] statement." ' " *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1540 n. 10 (10th Cir.1955) (quoting *City of Timber Lake v. Cheyenne River Sioux Tribe*, 10 F.3d 554, 557 (8th Cir.1993) (brackets in original), *cert. denied*, —— U.S. ——, 114 S.Ct. 2741, 129 L.Ed.2d 861 (1994) (quoting *McCoy v. Massachusetts Inst. of Tech.*, 950 F.2d 13, 19 (1st Cir. 1991), *cert. denied*, 504 U.S. 910, 112 S.Ct. 1939, 118 L.Ed.2d 545 (1992))).

ship, trust, and/or reservation status by congressional or administrative action. *See* Pretrial Order at 5 & n. 1.

(a) Indian Allotments No Longer Held in Trust

Lands allotted to individual Indians that have passed into fee status after 1905" were never part of the "opened lands" and therefore were not affected by the restoration of unallotted lands to the public domain under the 1902 Act. Had Congress explicitly terminated the Uintah Reservation as a whole, leaving only individual Indian allotments, 18 U.S.C. § 1151(a) would not apply and the result may well be different, as it was in *DeCoteau* or *Yazzie*.[42] "Indian country" under § 1151(c) consists of individual Indian allotments, but only those allotments, "the Indian titles to which have not been extinguished." Were there no existing Uintah and Ouray Reservation as such, the State and Local Defendants' argument that trust status is determinative would be more persuasive. But

---

[42] In their arguments, counsel for the State and Local Defendants refer to one passage from this court's initial memorandum opinion discussing the effect of the 1902 Act, considered by itself:

> Without much question, opening of the original terms of the 1902 Act would have accomplished the termination of the reservation; the unallotted lands were to be "restored to the public domain"—language precisely suited to disestablishment under *Seymour v. Superintendent* . . . and *Mattz v. Arnett*, ...

521 F.Supp. at 1122 (footnote & citations omitted). Had Congress spoken but once, and had *all* of the unallotted lands been "restored to the public domain" under the 1902 Act, this case would more closely resemble *DeCoteau*, where "the tribe and the Government were satisfied that retention of allotments would provide an adequate fulcrum for tribal affairs," and the reservation itself was terminated. 420 U.S. at 446, 95 S.Ct. at 1094. But as Justice Stewart took pains to point out in *Perank*, not all of the unallotted lands were so restored; the Uintah Reservation has always consisted of more than the mere "retention of allotments," starting with the 250,000-acres of grazing lands reserved for tribal use under the Joint Resolution of June 19, 1902 and the Acts of 1903 and 1905. 858 P.2d at 934 & n. 10. *See* "The Uintah Reservation: 'Diminished' or 'Terminated'?" *supra*.

where "all parties agree that the Uintah Reservation, as a political entity, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use," (*Perank*, 858 P.2d at 934), § 1151,(a) still finds application and the more limited language of § 1151(c) does not control.

Application of §1151(a) to areas of the Reservation encompassing former Indian allotments also serves to lessen the burden on governmental and law enforcement agencies of determining "jurisdiction dependent on the tract book." *DeCoteau*, 420 U.S. at 466-67, 95 S.Ct. at 1103-04 (Douglas, J., dissenting). When located within a defined reservation boundary, jurisdiction remains constant even through trust status or ownership of a specific tract may change over time. *See Yazzie*, 909 F.2d at 1422 ("Although subsection 1151(a) clarifies that checkerboard *titles* within an existing reservation do not affect the status of an Indian reservation as reservation, subsections 1151(b) and (c) allow checkerboard *jurisdiction* outside reservation boundaries." (Emphasis in original; footnote omitted)). At the September 12, 1994 hearing, the court discussed this concept with counsel for the State of Utah:

> THE COURT: You tell me that you acknowledge, at this point, that the State of Utah has no jurisdiction over what you characterize as trust lands?
>
> Mr. ANDREWS: With very limited exceptions
>
> . . . .
>
> . . . .
>
> THE COURT: And you acknowledge, at least [as] to that area, the existence of a peripheral boundary of some kind?
>
> MR. ANDREWS: At this point there is a legal description as to what are trust lands and what are not.
>
> THE COURT: Now, just as a matter of curiosity, and this is strictly hyopthetical; say I am a tribal member with an allotment and I am right on the

> border. And . . . I convey out to a non-Tribe member. Do we thus, through private act, diminish the boundaries?
>
> MR. ANDREWS: I believe that the act of conveying out an interior portion—
>
> . . . .
>
> At this point, the state's position would be that in fact the conveyance out of some interior portion of some block would in fact be a reduction of the lands.
>
> THE COURT: A diminishment?
>
> MR. ANDREWS: In other words, it would not be Indian country.
>
> THE COURT: And without any legislative action on the part of anybody?
>
> MR. ANDREWS: That would be correct. I would point out that the issue of that circumstance has in fact been dealt with in the Yazzie case.

Transcript of Hearing, dated September 12, 1994, at 56:14-57:24.

Indeed, the *Yazzie* case was remanded "for consideration of whether some or all of P & M's South McKinley Mine is within Indian country under 18 U.S.C. §§ 1151(b) or (c)." 909 F.2d at 1422. On remand, it was determined that 48 Navajo trust allotments on 7,347 acres represent 47% of the surface area where the mine is located, with tribal and federal ownership representing 7% and 5% of the mine area, respectively. *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1534, 1542 (10th Cir.1995). The subsurface estate underlying the mine area is owned 52% by the United States and 47% by the successor in interest to the Santa Fe Pacific Railroad. *Id.* Rejecting Pittsburgh & Midway's argument that its coal mine is not located within "Indian country" under § 1151(c) "because neither the Navajo Nation nor any individual Navajo allottee holds title to any of the subsurface coal estate," the Tenth Circuit expressed strong disapproval of measuring jurisdiction according to changes in ownership:

> If we were to accept P & M's argument, jurisdiction would depend on commercial transactions between the United States, New Mexico, the Navajo Nation, and various private parties. *A particular parcel of land, or even an individual stick in the bundle of property rights, could suddenly change jurisdiction as a result of a single commercial transaction. This is an untenable prospect.* Such a result would unnecessarily complicate already convoluted jurisdictional questions throughout the West. *See generally* Paul W. Gates, *History of Public Land Law Development* (1968).
>
> We hold that the 48 trust allotments comprising 47% of the surface area of the South McKinley mine site are Indian country by definition under 18 U.S.C. § 1151(c). . . .

52 F.3d at 1542 (emphasis added). Even in an allotments-only setting governed by § 1151(c), altering the jurisdictional landscape by private conveyance is viewed with disfavor in this Circuit.

Recognizing that the Uintah Reservation continued to exist as a reservation after 1905, as was acknowledged in *Perank*, and that *Hagen* "redefined the Reservation boundaries resulting from our earlier decision" in *Ute Indian Tribe*, as most recently observed by the Tenth Circuit in *Cuch*, the Reservation continues to embrace those lands never "opened" as well as lands once opened but later "restored to tribal jurisdiction" (*Perank*), and thus embraced within its "limits" under 18 U.S.C. § 1151(a), regardless of transitory shifts in ownership.

More analogous to this case than *DeCoteau* or *Yazzie*, the diminishment of the Rosebud Reservation again proves instructive. In *Beardslee v. United States*, 541 F.2d 705 (8th Cir.1976), the defendant argued that the federal district court lacked jurisdiction over his offenses occurring "in a house on land then owned by non-Indians" located in Mission, South Dakota, within Todd Country

and the Rosebud Reservation. 'The original patent had been issued to an Indian allottee, but the Indian title was extinguished by conveyance to non-Indians in 1959." 541 F.2d at 706-707. Relying on *DeCoteau*, the defendant argued that the fee patented land in question was no longer "Indian country":

> The Indian conduct in *DeCoteau* did occur on non-Indian, unallotted land within the 1867 reservation boundaries. . . . However, the Supreme Court *also* concluded that as to this particular land, reservation status had been terminated by the Congressional Act of March 3, 1891, . . . Appellant cites no statute similarly disestablishing the reservation status of Todd County in the Rosebud Reservation.
>
> Ownership of the land alone by a non-Indian is not sufficient to change reservation status . . . .

Id. at 707 (emphasis in original; citations omitted). In the context of a *diminished* reservation, " 'Disestablishment thus is not effected by an allotment to an Indian or by conveyance of the Indian title to a non-Indian.' " *Id.* (quoting *Beardslee v. United States*, 387 F.2d 280, 286 (8th Cir.1967)).[43] Where the Reservation's "limits" persist, even though reduced or "redefined," § 1151(a) remains pertinent. Jurisdiction under § 1151(a) is allocated as a function of a defined, stable, and knowable *where* rather than merely a reflection of the vicissitudes of *who owns what* and *when*.

(b) Lands Distributed to Mixed-Blood Utes Under the Ute Partition Act

Tribally owned lands divided and distributed under the Ute Partition Act, Act of August 27, 1954, ch. 1009, 68

---

[43] As noted above, nothing in *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977), or later cases disputes the *Beardslee* analysis affirming the continued reservation status of Todd County. *See* footnote 29 *supra*.

Stat. 868, *codified at* 25 U.S.C.A. §§ 677-677aa (1983), likewise do not appear to fall within the 1905 "opened lands" diminishment under *Hagen*. The State and Local Defendants contend that because "fee lands distributed to former tribal members under the Ute Partition Act" are "not 'within the limits' of a reservation, the exterior boundaries having been diminished, they do not fit within any subdivision of 18 U.S.C. § 1151, and cannot be considered 'Indian country' for jurisdictional purposes." Defendants' Memorandum at 22. Yet it appears those lands were considered "Indian country" *before* they were distributed under the Act, and as tribal lands held in trust, even the defendants would concede that point. These were not Indian allotments, "the Indian titles to which have not been extinguished" (§ 1151(c)); absent a finding of "dependent Indian community" status under § 1151(b), the lands must have fallen within § 1151(a) —lands which are in Indian country because they are "land *within the limits of any Indian reservation.*" 18 U.S.C.A. § 1151 (1984) (emphasis added).

For purposes of § 1151(a), "Indian tribal trust lands" are not a category of Indian country distinct from "land within the limits of any Indian reservation." In *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991), the Supreme Court expressly rejected a state-asserted distinction between "tribal trust land" and "reservation" status:

> Oklahoma argues that the tribal convenience store should be held subject to state tax laws because it does not operate on a formally designated "reservation," but on land held in trust for the Potawatomis. Neither *Mescalero* [*Apache Tribe v. Jones*, 411 U.S. 145, 93 S.Ct. 1267, 36 L.Ed.2d 114 (1973)] nor any other precedent of this Court has ever drawn the distinction between tribal trust lands and reservations that Oklahoma urges. In *United States v. John*, 437 U.S. 634[, 98 S.Ct. 2541, 57 L.Ed.2d 489] (1978),

> we stated that the test for determining whether land is Indian country does not turn on whether that land is denominated "trust land" or "reservation." Rather, we ask whether the area has been " 'validly set apart for the use of the Indians as such, under the superintendence of the Government.' " *Id.* at 648-649, [98 S.Ct. at 2548-49]; see also *United States v. McGowan*, 302 U.S. 535, 539[, 58 S.Ct. 286, 288, 82 L.Ed. 410] (1938).
>
> . . . Here, . . . the property in question is held by the Federal Government in trust for the benefit of the Potawatomis. As in *John, we find that this trust land is "validly set apart" and thus qualifies as a reservation* for tribal immunity purposes. 437 U.S. at 649[, 98 S.Ct. at 2549].

498 U.S. at 511, 111 S.Ct. at 910 (emphasis added). The Court reiterated this point in *Oklahoma Tax Commission v. Sac and Fox Nation*, 508 U.S. 114, 113 S.Ct. 1985, 124 L.Ed.2d 30 (1993):

> The Commission . . . contends that the relevant boundary for taxing jurisdiction is the perimeter of a formal reservation, not merely land set aside for a tribe or its members. . . . Here, . . . some of the Tribe's members may not live within a reservation; indeed, if the Commission's interpretation of the 1891 Treaty is correct and the Reservation was disestablished, none do.
>
> . . . We noted [in *Potawatomi*] that we have never drawn in the distinction Oklahoma urged. Instead, we ask only whether the land is Indian country. . . . Accord, F. Cohen, Handbook of Federal Indian Law 34 (1982 ed.) ("[T]he intent of Congress, as elucidated by [Supreme Court] decisions, was to designate as Indian country all lands set aside by whatever means for the residence of tribal Indians under federal protection, together with trust and restricted Indian allotments."); *Ahboah v. Housing Authority*

> *of Kiowa Tribe of Indians,* 660 P.2d 625, 629 (Okla.1983) (same).
>
> . . . .
>
> Absent explicit congressional direction to the contrary, we presume against a State's having the jurisdiction to tax within Indian country, whether the particular territory consists of a formal or informal reservation, allotted lands, or dependent Indian communities. . . .

508 U.S. at 124-25, 128, 113 S.Ct. at 1991-92, 1993.

As Justice Marshall noted in *Solem,* "Congress uncouple[d] reservation status from Indian ownership, and statutorily define[d] Indian country to include lands held in fee by non-Indians within reservation boundaries" in § 1151(a). *Solem,* 465 U.S. at 468, 104 S.Ct. at 1164. On this point, the State and Local Defendants' " 'Indian country'-equals-trust lands" equation collides with the express language of the statute. In arguing that "after diminishment, when lands *leave* trust status, they no longer fit within any category of 18 U.S.C. § 1151, and so are no longer Indian Country," (Defendants' Memorandum at 20), the defendants seek to *recouple* reservation status and tribal trust status—in effect writing the "Notwithstanding issuance of any patent" language entirely out of § 1151(a).

All of the case law cited in support of the defendants' "trust lands only" theory of Indian country concerns the status of Indian allotments remaining in disestablished areas of a reservation. *See United States v. Pelican,* 232 U.S. 442, 449, 34 S.Ct. 396, 399, 58 L.Ed. 676 (1914) (allotted lands remain "validly set apart for the use of the Indians" where they were excepted from restoration of portion of reservation to the A.O. public domain); *Rosebud Sioux Tribe v. Kneip,* 430 U.S. 584, 615-616 n. 48, 97 S.Ct. 1361, 1377-78 n. 48, 51 L.Ed.2d 660 (1977) (Indian allotments outside diminished reservation remain "Indian country"); *DeCoteau v. District County*

Court, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975) (reservation terminated; only Indian allotments remain); *Pittsburgh & Midway Coal Mining Co. v. Yazzie,* 909 F.2d 1387 (10th Cir.1990) (same). They cite no case holding that "Indian tribal trust lands" no longer fall within § 1151(a) when they "leave trust status," presumably through issuance of a patent.

At one time, "Indian country" status was held to be dependent upon Indian title, and that land ceased to be Indian country "[as] soon as they parted with the title . . . without any further act of Congress, . . ." *Bates v. Clark,* 95 U.S. 204, 208, 24 L.Ed. 471 (1877). *See United States v. Celestine,* 215 U.S. 278, 285, 30 S.Ct. 93, 94, 54 L.Ed. 195 (1909) (Indian country and reservation status not synonymous). Congress deliberately abandoned the title-dependent definition of Indian country by enacting 18 U.S.C. § 1151(a) in 1948. *See* FELIX S. COHEN FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 29-38 (Rennard Strickland, ed. 1982). This court has found no authority suggesting that the title-dependent *Bates v. Clark* definition of "Indian country" persists as a rule of federal law despite the enactment of § 1151(a). *See also Ute Indian Tribe,* 521 F.Supp. at 1081-1084.

"Congress has defined Indian country broadly to include formal and informal reservations, dependent Indian communities, and Indian allotments, whether restricted or held in trust by the United States. *See* 18 U.S.C. § 1151." *Sac and Fox,* 508 U.S. at 123, 113 S.Ct. at 1990. Once land has been " 'validly set apart for the use of the Indians as such, under the superintendence of the Government,' "[44] it becomes "land within the limits of any Indian reservation" under § 1151(a). Having once been "validly set apart" as Reservation land, "all tracts included within it remain a part of the reservation until separated therefrom

---

[44] *United States v. John,* 437 U.S. 634, 649, 98 S.Ct. 2541, 2549, 57 L.Ed.2d 489 (1978) (quoting *United States v. Pelican,* 232 U.S. 442, 449, 34 S.Ct. 396, 399, 58 L.Ed. 676 (1914)).

by Congress." *United States v. Celestine*, 215 U.S. 278, 285, 30 S.Ct. 93, 94, 54 L.Ed. 195 (1909); *accord, Indian Country, U.S.A.*, 829 F.2d at 973-976. As noted above, land within such limits remains Indian country "notwithstanding the issuance of any patent," *i.e.*, any change in title or ownership. 18 U.S.C. § 1151(a). The same would appear to be true of tribal lands distributed in fee to individual Mixed-Blood Utes under the Ute Partition Act.

It therefore seems that the more pertinent question in this case is whether the Ute Partition Act worked its own separate diminishment of the Reservation as to those lands conveyed to the Mixed-Blood Utes. The Tribe represents that approximately 211,430 acres of tribal land were distributed to the Mixed-Blood Utes pursuant to the Ute Partition Act, and that since 1954, the Tribe has reacquired and placed into trust status approximately 179,000 acres of lands distributed under the Act. Brief of Ute Indian Tribe at 16 & n. 21. As to the latter acreage, of course, it remains uncontroverted that it comprises part of the Reservation and is located within "Indian country" under 18 U.S.C. § 1151. Thus, based upon the Tribe's figures, approximately 32,430 acres of land distributed under the Ute Partition Act remain in non-frust, or fee status.[45]

In *Hackford v. Babbit*, 14 F.3d 1457 (10th Cir.1994), the Tenth Circuit dealt with continuing Indian water rights appurtenant to lands distributed under the Ute Partition Act and currently owned by a Mixed-Blood Ute individual. Plaintiff Calvin C. Hackford, a terminated Mixed-Blood Ute belonging to the Uintah Band, "owns seven parcels

---

[45] In the Memorandum from the Regional Solicitor, U.S. Dept. of the Interior to the Superintendent, Uintah and Ouray Agency, dated July 7, 1994, at 11-12, the Government reports that 26,763.34 acres were sold into fee status pursuant to 25 U.S.C.A. § 677h, and indicates that under 25 U.S.C.A. § 677*l*, fee patents were issued for 2,733.569 acres of former allotments, 29,030,969 acres of tribal agricultural lands, and 16,190.61 acres of grazing lands.

of land *within the Uintah and Ouray Indian Reservation* in Utah." 14 F.3d at 1459 (emphasis added).[46] Some of those parcels are served by the Uintah Irrigation Project, which is managed by the United States Department of the Interior. *Id.* The Tenth Circuit held that under the provisions of the Ute Partition Act, Hackford retained water rights sharing the same priority date as water rights appurtenant to other reservation lands, *viz,* no later than the creation of the reservation in 1861, consistent with *Winters v. United States,* 207 U.S. 564, 577, 28 S.Ct. 207, 211, 52 L.Ed. 340 (1908). *Id.* at 1467-69.

The court has reviewed the Ute Partition Act and finds nothing dealing with the question of reservation boundaries, at least in express terms. However, the Act does contain language that bears upon some jurisdictional questions: Section 16 of the Act, 25 U.S.C.A. § 677*o*, provides that "[w]hen any mixed-blood member of the tribe has received his distributive share of the tribal assets distributed to the mixed-blood group under the provisions of section 677i," the Secretary of the Interior "is authorized and directed to immediately transfer to him unrestricted control of all other property held in trust for such mixed-blood member by the United States," as well as "remov[ing] all restrictions on the sale or encumbrance of trust or restricted property owned by such member of the tribe, and Federal supervision of such member and his property shall thereby be terminated," with the exception of any interest in unadjudicated or unliquidated tribal claims, rights or assets which remain in trust under the Act. *See generally* 25 C.F.R. § 217.1 *et seq.* (1995).

[46] However, *Hackford* was decided on January 21, 1994, approximately one month *before* the United States Supreme Court announced its decision in the *Hagen* case. While *Hagen* likely will have no practical impact on the management of Ute water rights under the Ute Partition Act, the language of the *Hackford* opinion quoted above cannot strictly be viewed as controlling on the question whether lands distributed to the Mixed-Blood Utes remain within Reservation boundaries following *Hagen.*

Section 17 of the Act, 25 U.S.C.A. § 677p, provides that "[a]fter seven years from August 27, 1954, all property distributed to the mixed-blood members of the tribe . . . and all income derived therefrom . . . shall be subject to the same taxes, State and Federal, as in the case of non-Indians; . . .," excepting income of corporations organized to jointly manage unliquidated and undistributed tribal assets. Section 18 of the Act, 25 U.S.C.A. § 677q, similarly provides that after federal supervision of Mixed-Blood Ute property is terminated, "the laws [with respect to the probate of wills, determination in heirship, and the administration of estates] of the several States, Territories, possessions and the District of Columbia within which such mixed-blood members reside at the time of their death shall apply." Section 23 of the Act, 25 U.S.C. § 677v, provides that following removal of trust restrictions on the property of Mixed-Blood Ute members, "All statutes of the United States which affect Indians because of their status as Indians shall no longer be applicable to such member over which supervision has been terminated. and the laws of the several States shall apply to such member in the same manner as they apply to other citizens within their jurisdiction."

The jurisdictional provisions of the Ute Partition Act operate to render those tribal members over whom federal supervision was terminated virtually indistinguishable from their non-Indian neighbors. The individual property of the Mixed-Blood Utes, together with land distributed to them under the Act, was removed from trust status and federal supervision, and in essence, conveyed to them in fee. With few qualifications, their lands became subject to taxation, probate administration, and alienation under State law just as if they were fee lands owned by non-Indians. Individual Mixed-Blood Utes became subject to state laws "in the same manner as they apply to other citizens within their jurisdiction," *i.e.*, as though the Mixed-Blood Utes were non-Indians.

Yet the effects of the Ute Partition Act, though drastic, were not absolute. For example, Section 21 of the Act, 25 U.S.C.A. § 677t, expressly states that "[n]othing in this subchapter shall abrogate any water rights of the tribe or its members." As explained in *Hackford*, "water rights were treated as appurtenant to the lands that were divided between the groups" under the Act; irrigable lands such as those owned by Mr. Hackford retained a right of user to water reserved for the Ute Indian Tribe under the *Winters* doctrine when the Reservation was created in 1861. 14 F.3d at 1463, 1468-69. Although "the individuals with irrigable land may have a right of user to the water," *Hackford* points out that "the water right itself is a tribal right." 14 F.3d at 1468.

> When the United States set aside and reserved land for the Indians, it also impliedly reserved sufficient water to accomplish the purposes for which the reservation was established. *Winters*, 207 U.S. at 577, 28 S.Ct. at 212. . . . When the reservation land was allotted, and the Project developed, the allottees acquired the right to use a portion of the tribe's reserved water right with a priority date no later than the creation of the reservation. *United States v. Powers*, 305 U.S. 527, 532-33, 59 S.Ct. 344, 346, 83 L.Ed. 330 (1939). Therefore, Hackford's right of user, whether derived from the Uintah Band or the Ute tribe, has the same priority date as that delivered through the Project to allotted lands.

14 F.3d at 1469. *Hackford* further concluded that "[u]nder the Partition Act the Secretary's authority to manage the [Uintah Indian Irrigation] Project and assess charges was unaffected." *Id.* at 1468. "Likewise the Partition Act did not change the trust relationship set up by the 1906 Act." *Id.* *Hackford* holds that for purposes of management of the Uintah Indian Irrigation Project and the Ute tribal reserved water rights upon which it is based, the non-trust lands of a Mixed-Blood Ute distributee

under the Ute Partition Act are treated in a manner indistinguishable from Indian trust lands served by the Project. A finding that the lands distributed to Mixed-Blood Utes under the Act remain apart of the Uintah Reservation seems wholly consistent with the continuing use of the Tribe's reserved water rights pursuant to *Winters* and its progeny to irrigate the distributed lands.

Similarly, this court previously held that the Ute Partition Act did not divest individual Mixed-Blood Utes of their personal rights of user in hunting and fishing rights belonging to the Ute Indian Tribe, or limit the exercise of those rights to the lands distributed to Mixed-Blood Utes under that Act. *United States v. Felter,* 546 F.Supp. 1002 (D.Utah 1982), *affirmed,* 752 F.2d 1505 (10th Cir. 1985). *Felter* holds that the tribal hunting and fishing rights represent another example of "other assets not susceptible to equitable and practical distribution," 25 U.S.C. § 677i, which remain in trust under joint management of the Tribe and the Mixed-Blood Utes, and makes no distinction between lands distributed to the Mixed-Blood Utes and lands retained in tribal ownership.

Citing to *Felter* and to § 23 of the Ute Partition Act, 25 U.S.C. § 677v, the State and Local Defendants argue that "[t]here is another compelling reason for not considering former UPA lands as 'Indian Country' for jurisdictional purposes. . . . § 23 of the UPA provided that . . . all statutes affecting Indians because of their status as Indians would no longer be applicable to mixed-bloods, and State and Local Defendants' Memorandum at 22 n. 16. "In short," defendants assert, "state law applies to mixed-bloods and their lands as with any other citizen of the State." *Id.*[47] Rejecting a similar argument that § 6

---

[47] Of course, *Felter* holds otherwise as to Indian hunting and fishing rights. *See* 546 F.Supp. at 1024 (Mixed-Blood Utes' right of user in tribal hunting and fishing rights "would remain subject to *tribal* regulation, whether on or off tribally or Indian owned

of the General Allotment Act, which provided that upon issuance of patents in fee to Indian allottees, "each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside . . .,"[48] extended state jurisdiction over fee-patented allotments, the Supreme Court in *Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 96 S.Ct. 1634, 48 L.Ed.2d 96 (1976), observed:

> If the General Allotment Act itself establishes Montana's jurisdiction as to those Indians living on "fee patented" lands, then for *all* jurisdictional purposes—civil and criminal—the Flathead Reservation has been substantially diminished in size. . . .
>
> . . . The State has referred us to no decisional authority and we know of none—giving the meaning for which it contends to § 6 of the Allotment Act in the face of the many and complex intervening jurisdictional statutes directed at the reach of state law within reservation lands—statutes discussed, for example, in *McClanahan*, 411 U.S., at 173-79[, 93 S.Ct., at 1262-66]. . . . Congress by its more modern legislation has evinced a clear intent to eschew any such "checkerboard" approach within an existing Indian reservation, and our cases have in turn followed Congress' lead in this area.

425 U.S. at 478, 479, 96 S.Ct. at 1643, 1644 (emphasis in original). Arguably, the distribution of tribal lands in fee to Mixed-Blood Ute distributee under the Ute Parti-

---

lands. It would be subject at most to minimal state regulations. *See Kimball v. Callahan*, 590 F.2d [768], at 776-777 [(9th Cir. 1979), *cert. denied*, 444 U.S. 826[, 100 S.Ct. 49, 62 L.Ed.2d 33]]" (Emphasis in original.)). *Accord, Menominee Tribe of Indians v. United States*, 391 U.S. 404, 88 S.Ct. 1705, 20 L.Ed.2d 697 (1968).

[48] Act of February 8, 1887, ch. 119, § 6, 24 Stat. 390, *codified as amended* at 25 U.S.C.A. § 349 (1983).

tion Act by itself can reduce the size of the Uintah Reservation "for *all* jurisdictional purposes" no more than § 6 of the General Allotment Act diminished the Flathead Reservation in *Moe*.

Conceding that § 23 of the Act is "not controlling on the issue of what lands fall within § 1151," the State and Local Defendants suggest that "the pattern of UPA lands to tribal jurisdiction cuts against the purposes of the UPA, and would be likely to engender additional disputes between the Tribe and the mixed-blood former members." Defendants' Memorandum at 22 n. 16. Remembering that under the Ute Partition Act "the mixed blood former members" became jurisdictionally indistinguishable from non-Indians in almost all respects, the same is true whether they are found within or outside of "Indian country" under § 1151(a). Blanket application of state law to the Mixed-Blood Utes is not so much a statement that they no longer reside within "Indian country" [49] as it is a statement that the Mixed-Blood Utes are no longer deemed to be "Indians" for purposes of federal law, including 18 U.S.C. §§ 1151 *et seq*. Except as to those matters which are retained in trust status or under federal, tribal, or joint tribal/mixed-blood management under the Act (*e.g.*, oil, gas, water, hunting and fishing rights, etc.), the Tribe could assert on greater jurisdiction over Mixed-Blood Ute individuals than it can over non-Indians located on fee lands within "Indian country," a result which hardly

---

[49] Following the enactment by Congress of the Ute Partition Act, Preston Allen, a Mixed-Blood Ute "residing on the Uintah Indian Reservation in Duchesne County, Utah," was denied the right to vote by Porter Merrell, Duchesne County Clerk, in a state-supervised election—a denial prompted by state statute and rationalized by the Utah Supreme Court based upon Allen's continued residence on *an existing Indian reservation. Allen v. Merrell*, 6 Utah 2d 32, 305 P.2d 490, 492-495 (1956), *vacated and remanded as moot*, 353 U.S. 932, 77 S.Ct. 809, 1 L.Ed.2d 756 (1957).

As to this issue, the State of Utah does not write on the cleanest of slates.

"cuts against the purposes of the UPA." Given that the Ute Partition Act expressly contemplates a continuing relationship between the Tribe and its former members as to undivided assets, the defendants' argument founders.

Adapting the "fairly clean analytical structure" established by the Supreme Court in *Hagen* and *Solem*, as well as the earlier decisions examined in detail in this court's initial memorandum opinion (*see* 521 F.Supp. at 1085-1092), to the language, history, and circumstances surrounding the Ute Partition Act, this court finds nothing clearly evidencing a congressional intent to alter or further diminish the boundaries of the Uintah Reservation by distributing tribally-owned lands to the Mixed-Blood Utes, or "events surrounding the [Act's] passage . . . [which] unequivocally reveal a widely held, contemporaneous understanding" that such was Congress' purpose. *Solem*, 465 U.S. at 471, 104 S.Ct. at 1166. *Cf. Peabody Coal Co. v. Navajo Nation*, 75 F.3d 457, 464 (9th Cir.1996) (partition of tribal lands under Navajo-Hopi Land Settlement Act of 1974 not a reservation "diminishment"; Act divided Navajo-Hopi joint use area into two separate reservations). During the short-lived "termination era," Congress' attention was largely focused on other questions.[50] The "Indian country" status of the distributed

---

[50] In 1953, Congress had created a wholly separate mechanism to extend state jurisdiction over Indian reservations, Public Law 83-280. *See* Act of August 15, 1953, ch. 505, 67 Stat. 588; FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 175-77 (Rennard Strickland ed. 1982). If anything, Congress in 1954 was contemplating much more sweeping goals—the ultimate termination of entire tribes as well as their reservations—in order to bring an end to the perceived evils of federal supervision, and thus would have given little or no thought to adjustment of reservation boundaires during the interim. *See generally*, H.R.Con.Res. 108 83d Cong., 1st Sess., 67 Stat. B132 (1953); FELIX S. COHEN'S HANDBOOK OF FEDERAL LAW 170-75; DONALD L. PARMAN, INDIANS AND THE AMERICAN WEST IN THE TWENTIETH CENTURY 135-142 (1994); Charles Wilkinson & Eric Biggs, *The Evolution of the Termination Policy*, 5 AM. INDIAN L.REV. 139 (1977).

lands thus did not change either upon distribution or upon the later reacquisition of many of the parcels by the Tribe; these lands remained within the "limits" of the Reservation under § 1151(a) at all pertinent times.

(c) Lands Exchanged into Non-Trust or Fee Status

The third category of non-trust, or fee lands identified in Paragraph 5.C of the Pretrial Order is "lands that were held in trust after the Reservation was opened in 1905 but that since have been exchanged into fee status by the Tribe for then-fee (now trust) lands in an effort to consolidate its land holdings." Like the individual Indian allotments discussed above, the lands embraced by this latter category (at least as it is defined) were never part of the "opened lands" restored to the public domain under the 1902 Act.

Had Congress explicitly terminated the Uintah Reservation as a whole, 18 U.S.C. § 1151(a) would not apply and the result as to these "exchanged" fee lands may well be different. As with the Indian allotments, were there no existing Uintah and Ouray Reservation as such, the State and Local Defendants' argument that trust status is determinative might prevail. But where "all parties agree that the Uintah Reservation, as a political entity, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use," (*Perank*, 858 P.2d at 934), § 1151(a) still finds application.

The Indian Land Consolidation Act, Pub.L. No. 97-459, title II, 96 Stat. 2517 (1983), *codified* at 25 U.S.C.A. §§ 2201-2211 (Supp. 1995), appears primarily directed to exchanges of Indian tribal lands for individual Indian trust lands (*e.g.*, allotments) in an effort to consolidate tribal land holdings. *See* 25 U.S.C.A. § 2203(a). 25 U.S.C.A. § 2204 states that "[a]ny Indian tribe may purchase at no less than the fair market value part or all of the interests in any tract of trust or restricted land *within that*

tribe's reservation or otherwise subject to that tribe's jurisdiction with the consent of the owners. . . ." (Emphasis added.) The Act also includes provisions permitting restrictions on dissipation of individual Indian trust holdings through inheritance by non-Indians. *See* 25 U.S.C.A. §§ 2205-2206. The Indian Land Consolidation Act represents a House-conceived expansion of a Senate bill designed both to permit the consolidation of checkerboarded tribal landholdings within the opened Devil's Lake Sioux Reservation in North Dakota and to "reduce instances of fractionated heirship in trust lands and provide land for tribal programs designed to improve the economy of the tribe and its members. . . ." H.Rep. No. 97-908, 97th Cong., 2d Sess. 5 (reprinted in 1982 *U.S. Code Cong. & Admin. News* 4415, 4416).[51] The House amendment incorporated language of H.R. 5856, "an omnibus bill which makes provisions almost identical to [the Senate bill] applicable to all tribes." *Id.* at 9 (reprinted in 1982 *U.S.Code Cong. & Admin.News* at 4419). As the House Committee Report explains:

> Many Indian tribes do not own all their lands in a single tract but have their tribal lands spread out in many tracts over a large geographical area where tracts of land are owned by the tribe, by individual Indians who hold their lands in trust or restricted fee and by non-Indians holding their lands in fee. This "checkerboard" pattern of land ownership makes it very hard for tribes to develop and adopt comprehensive and constructive land use plans. The amend-

---

[51] S. 503, the original Senate version of the Indian Lands Consolidation Act, concerned the Devil's Lake Sioux Reservation, a reservation where the unallotted lands were "opened" to non-Indian entry without diminishment or termination of the reservation's boundary. *See, e.g., United States v. Grey Bear*, 636 F.Supp. 1551 (D.N.D.1986), *affirmed in part, reversed in part on other grounds*, 828 F.2d 1286 (8th Cir.1987), *district court affirmed on en banc rehearing re: misjoinder issue*, 863 F.2d 572 (8th Cir.1988).

> ment provides certain mechanisms by which the tribes will be able to consolidate their tribal landholdings by allowing the Secretary of the Interior to acquire certain lands for the tribes and allowing tribes to exchange and sell certain tribal lands.

Id. at 10 (reprinted in 1982 *U.S. Code Cong & Admin. News* at 4419). Thus, the Act is directed more toward consolidation and expansion of tribally owned lands for purposes of land use planning and economic development than the redrawing of jurisdictional boundaries.

As with Indian allotments, where such land exchanges take place within the existing boundaries of a reservation, the transition of a particular parcel into or out of tribal ownership or trust status has no impact on the existing jurisdictional limits. Under the Defendants' "trust-lands-only" analysis of "Indian country," the jurisdictional landscape would be altered each time an exchanged parcel changes trust status, further complicating any tribal land consolidation program.

As to each of the three categories of non-trust, or fee lands identified in Paragraph C of the Pretrial Order, *Hagen* and *Ute Indian Tribe* are not locked in irreconcilable conflict. Under both rulings, these lands remain within the "limits" of the Reservation for purposes of 18 U.S.C. § 1151(a) and are found within "Indian country" regardless of their particular ownership status, at least so long as they are not found among the unallotted and unreserved lands "opened" in 1905 and never subsequently restored to the Reservation by legislative or administrative act. It is only as to the latter category, the "opened" lands never restored to the Reservation, that *Hagen* and *Ute Indian Tribe* diverge.

As an attachment to the United States' Memorandum as *amicus curiae*, the Government submitted a preliminary draft "Uintah and Ouray Reservation Ownership Status Map" illustrating the land tenure and current status of

various tracts located within the original Uintah Reservation boundaries. The exhibit uses contrasting colors to differentiate the various categories of land discussed above, based upon the Government's on-going compilation of land tenure data. *Orange*, for example, indicates current Ute tribal trust lands, while *medium blue* and *light blue* identify "opened" lands which were the subject of homestead or "cash entry," respectively. The disputed categories of non-trust, non-opened lands just discussed (former Indian allotments, etc.), together with existing Indian trust allotments, are aggregated within the map's *purple* regions.

Counsel has made it very clear that the exhibit does not represent the final word as to the land tenure of each tract depicted. Nonetheless, the exhibit does offer a fair approximation of what a tract map reflecting the effects of the 1902-1905 Acts as read in *Hagen* would look like, as modified to account for those lands subsequently restored to the Reservation by congressional or administrative action. Treated as an illustrative rather than a definitive work, the exhibit offers helpful guidance in identifying those lands within the original boundaries of the Uintah Reservation which are affected by the Supreme Court's *Hagen* decision.

Ute Indian Tribe, Hagen and the Finality of Litigation

Having defined the point of divergence between *Hagen* and *Ute Indian Tribe*, the court turns to the next question presented: *which* ruling governs as to the parties to this action? Each party argues the merits—and asserts the obviousness—of its preferred answer to that query. Paragraphs 5.A and 5.B of the Pretrial Order frame the question of which ruling governs in these terms:

> A. In spite of *Hagen*, are the State and Local Defendants precluded as a matter of law or equity under the doctrine of collateral estoppel or otherwise, from asserting jurisdiction over the Tribe or its

members within the exterior boundaries of the Uintah and Ouray Reservation, as those boundaries were defined in *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir.1985), *cert. den.* 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986)?

B. Although the U.S. Supreme Court denied the Tribe leave to intervene as a party in *Hagen*, is the Supreme Court's decision binding on the Tribe and its members in this action under the doctrine of *stare decisis* or otherwise?

Both of these questions raise important policy concerns involving the finality of a court's judgment in a litigated dispute and the need for uniformity of federal law throughout our judicial system as well as the supervisory power of both the Supreme Court and the courts of appeals.

(a) *Ute Indian Tribe*, Res Judicata and Collateral Estoppel

Relying upon the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283 (1994), in seeking further injunctive relief in this proceeding, the Ute Indian Tribe asserts collateral estoppel to be the controlling principle. The Tribe contends that as a party to this litigation, "the State was precluded from relitigating the issue resolved in *Ute Indian Tribe*, including whether Congress intended to diminish the Uintah Valley Reservation when it was opened to non-Indian settlement in 1905, against the Tribe or anyone in privity with the Tribe," (Brief of Ute Indian Tribe at 8), citing *Montana v. United States*, 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979). In *Montana*, the Supreme Court explained the role of the doctrines of res judicata and collateral estoppel in the judicial process and the important policies underlying both:

A fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, is that a "right, question or fact distinctly put in issue and directly determined

> by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. . . ." *Southern Pacific R. Co. v. United States,* 168 U.S. 1, 48-49[, 18 S.Ct. 18, 27, 42 L.Ed. 355] (1897).

440 U.S. at 153, 99 S.Ct. at 973. Under *res judicata,* "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action. . . ." *Id.* (citations omitted). Under *collateral estoppel,* "once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation. . . ." *Id.* (citations omitted).

> Application of both doctrines is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions. *Southern Pacific R. Co., supra,* at 49[, 18 S.Ct. at 27]; *Hart Steel Co. v. Railroad Supply Co.,* 244 U.S. 294, 299[, 37 S.Ct. 506, 507, 61 L.Ed. 1148] (1917). To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.

440 U.S. at 153-54, 99 S.Ct. at 973-74 (footnote omitted).

The State and Local Defendants respond that "[c]ollateral estoppel is a discretionary doctrine that has no application where there has been an intervening change in legal principles," (Defendants' Memorandum at 10), and that "[i]n light of the intervening substantive changes of law since *Ute Indian Tribe,* that decision's validity for collateral estoppel purposes is questionable at best." *Id.* at 23-24 (citing *Brock v. Williams Enterprises of Georgia,*

832 F.2d 567, 574 (11th Cir.1987), and *Kania v. Fordham*, 702 F.2d 475, 476 n. 2 (4th Cir.1983)). "The State and Local Defendants are therefore not bound by the Tenth Circuit's decision in *Ute Indian Tribe* where the logic of that decision has been undermined by *Hagen*." (*Id.* at 10 (footnote omitted)).

Both the Utah Supreme Court in *Perank* and the United States Supreme Court in *Hagen* formally sidestepped the question of the collateral estoppel effect of the Tenth Circuit's *Ute Indian Tribe* decision, relying largely upon notions of waiver. In *Perank*, the court hastened to point out that "neither Perank, the Department of Justice, nor the Tribe suggests that the Tenth Circuit's *en banc* decision in *Ute Indian Tribe* has res judicata effect in this case." 858 P.2d at 931 (footnote omitted). In its brief as *amicus*, the Tribe discussed only defendant Perank's status as an Indian; it was silent on the collateral estoppel question. For its part, the United States simply submitted a copy of the brief it had filed in opposition to the certiorari petition in *Ute Indian Tribe* six years earlier.

In *State of Utah v. Hagen*, [52] however, the Utah Court of Appeals had expressly relied on collateral estoppel in finding *Ute Indian Tribe* controlling on the boundary issue. Nevertheless, the Utah Supreme Court reversed, citing Perank, without further discussion of collateral estoppel.[53]

---

[52] 802 P.2d 745 (Utah Ct.App.1990) ("While we have not been acquainted with the precise arguments advanced by the state in *Perank*, we are hard-pressed to see how, given the Supremacy clause and the doctrine of collateral estoppel, our state courts could reach a contrary decision that would have any practical effect."), *reversed*, 858 P.2d 925 (Utah 1992).

[53] In footnote 3 of the *Perank* opinion, Justice Stewart essayed further concerning the collateral estoppel issue which *Perank* did not decide:

> Even if the defense had been raised in this case, its application against the State of Utah would be problematic. Although we have held that collateral estoppel does not require mutuality of parties when it is raised defensively against private litigants, . . . we have not decided whether the doctrine of nonmutual

The United States Supreme Court also declined to address the collateral estoppel effect of *Ute Indian Tribe* in *Hagen* on procedural grounds: because counsel initially representing petitioner Hagen had "disavowed the collateral estoppel argument at the petition stage," the Court saw "no reason to consider an argument that petitioner

---

collateral estoppel applies against the State. Federal law generally requires full mutuality of parties when collateral estoppel is applied against the government. *See United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984); *see also United States v. Stauffer Chemical Co.*, 464 U.S. 165, 169, 104 S.Ct. 575, 577, 78 L.Ed.2d 388 (1984); *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411, 66 L.Ed.2d 308 (1980); *Montana v. United States*, 440 U.S. 147, 155-62, 99 S.Ct. 970, 974-78, 59 L.Ed.2d 210 (1979); *Commissioner of Internal Revenue v. Sunnen*, 333 U.S. 591, 68 S.Ct. 715, 92 L.Ed.2d 898 (1948). Nonmutual collateral estoppel does not apply against the government because of overriding policy considerations. *Mendoza*, 464 U.S. at 163-64, 104 S.Ct. at 574. The rule requiring full mutuality of parties has also been required with respect to estopping state governments. *See Hercules Carriers, Inc. v. Florida*, 768 F.2d 1558, 1577-82 (11th Cir. 1985). *See generally* Restatement (Second) of Judgments § 28 (1982); 18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4425 (1981 & Supp. 1992). As the Utah cases cited in footnote 2 indicate, the issue of reservation diminishment can arise in a number of civil contexts in which the State of Utah is not a party, and rather than delay a decision on an issue of such substantial public importance that will inevitably recur, we think it appropriate to address the diminishment question, even if res judicata were otherwise applicable against the State.

858 P.2d at 931 n. 3 (citations omitted). In its Respondent's Brief submitted to the United States Supreme Court in *Hagen*, the State of Utah pointed to footnote 3 of *Perank* and argued that "[a]s applied to Perank, this discusion by the Utah Supreme Court is probably dictum. However, as applied to Hagen this language *is a direct and clear ruling*. The Utah Supreme Court determined it would not apply the doctrine of collateral estoppel to bar litigation of the Reservation diminishment issue for reasons of public policy . . .," and that this ruling "applies equally to Hagen." Brief of Respondent, at 47, 1993 WL 384805 (emphasis added). That is one reading of footnote 3. . . .

not only failed to raise but on which he expressly refused to rely in seeking a writ of certiorari, . . ." *Hagen*, 510 U.S. at 410, 114 S.Ct. at 965.[54]

The Tribe recounts that after certiorari had been granted in *State of Utah v. Hagen*, it filed a motion to intervene as a petitioner in the proceedings before the United States Supreme Court. The motion received a luke-

---

[54] In *Hagen*, Justice O'Connor suggested that "[p]etitioner's only recourse would have been to attack the judgment in *Perank* on the ground that the Utah Supreme Court failed to give effect sua sponte to the prior determination in *Ute Indian Tribe* that the reservation had not been diminished." *Hagen*, 510 U.S. at 409, 114 S.Ct. at 964. Yet Hagen was not petitioning for review of the judgment in *Perank*. Rather, Hagen had *prevailed* before the Utah Court of Appeals on grounds including collateral estoppel:

> The federal courts, construing federal statutes, federal regulations, and federal Indian policy, have determined that Myton is within the confines of the reservation. *See Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir.1985) (en banc), *cert. denied*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). . . . The Tenth Circuit's decision does not appear to hold open any role for the state courts in refining its holding in *Ute Indian Tribe*. While we have not been acquainted with the precise arguments advanced by the state in *Perank*, we are hard-pressed to see how, given the Supremacy clause and *the doctrine of collateral estoppel*, our state courts could reach a contrary decision that would have any practical effect.

State of Utah v. Hagen, 802 P.2d 745, 747 (Utah Ct.App.1990), *reversed*, 858 P.2d 925 (Utah 1992). Pushing the collateral estoppel issue aside, the Utah Supreme Court summarily reversed the court of appeals' holding in *Hagen* "that a 1985 Tenth Circuit decision had conclusively determined that Myton was in Indian country," concluding instead that "the court of appeals erred in treating Myton as Indian country" in light of *Perank*, which "establishes that for purposes of criminal jurisdiction, Myton, Utah, is not in Indian country." *Hagen*, 858 P.2d at 925-26. Unlike *Perank*, it seems fairly apparent that the question of the collateral estoppel effect of *Ute Indian Tribe* had been raised and ruled on in *Hagen*. Notwithstanding extensive briefing of the collateral estoppel issue by Hagen's successor counsel before the United States Supreme Court, the Court declined to consider the question. *See* Brief of Petitioner, 1993 WL 409365, at 1-9.

warm response from the State of Utah and ultimately was denied by the Court, relegating the Tribe once again to the role of an *amicus*. The Tribe now argues that as an *amicus*, it was not bound by the Court's ruling in *Hagen*, citing *Martin v. Wilks*, 490 U.S. 755, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989), *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 332-33 & n. 17, 99 S.Ct. 645, 652 & n. 17, 58 L.Ed.2d 552 (1979), and *Kerr-McGee Chemical Corp. v. Hartigan*, 816 F.2d 1177 (7th Cir.1987). According to the Tribe, "[t]he Supreme Court has ruled that a sovereign is not bound by a decision purporting to resolve a boundary dispute affecting that sovereign, when the sovereign was not a party to the proceedings," citing *Georgia v. South Carolina*, 497 U.S. 376, 110 S.Ct. 2903, 111 L.Ed.2d 309 (1990). Brief of Ute Indian Tribe at 11-12. Conversely, we may suppose, a sovereign *is* bound by a decision where that sovereign is a party to the proceedings.

The Tribe suggests that the consequences of the *Hagen* case, when considered in light of its procedural posture, are three-fold: (1) the Ute Indian Tribe is not directly bound by the United States Supreme Court's judgment in *Hagen* because the Tribe was never joined as a party to that proceeding; (2) the State of Utah is directly bound by the Tenth Circuit's *en banc* ruling in *Ute Indian Tribe v. State of Utah*, in which the State did participate as a party; and (3) the State of Utah may assert jurisdiction over non-Indians and non-member Indians within those portions of the original Uintah Valley Reservation "that were settled under the homestead and townsite laws pursuant to the 1905 Presidential Proclamation." Brief of Ute Indian Tribe at 11-13. In other words, the allocation of jurisdiction and governmental power in the Uintah Basin is defined by two inconsistent Reservation boundary overlays—one which allocates power among the named parties to this lawsuit in their dealings with each other (*Ute Indian Tribe*) and one that applies to everyone else (*Hagen*).

(b) Collateral Estoppel vs. *Stare Decisis*

The State and Local Defendants counter the Tribe's analysis by pointing out that "almost none of the Supreme Court's reservation disestablishment cases involved the affected tribe as a party, yet those cases dispositively determined the land status of the affected lands one way or the other," (Defendants' Memorandum at 8 (footnote omitted)), and that even *Montana v. United States* recognized that collateral estoppel may not apply where there has been a change in the governing law. *Id.* at 10 (citing *Montana,* 440 U.S. at 155, 99 S.Ct. at 974). The State and Local Defendants further contend that "[t]his Court is obliged to follow the Supreme Court's decisions as binding precedent, and this requirement applies both to the Supreme Court's choice of legal standard and the result reached under that standard." *Id.* at 7 (citing *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 947 F.2d 682, 691 (3d Cir.1991), *affirmed in part, reversed in part,* 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), and *Soto-Lopez v. New York City Civil Service Comm'n,* 755 F.2d 266, 272 (2d Cir.1985), *affirmed,* 476 U.S. 898, 106 S.Ct. 2317, 90 L.Ed.2d 899 (1986)). "The fact that the Tribe was not a party in *Hagen* . . . is irrelevant to whether this Court must follow *Hagen* in deciding whether or not to grant injunctive relief. . . . [T]he Tribe has confused the doctrines of *stare decisis* and collateral estoppel. . . ." *Id.*

Of course, *stare decisis,*[55] or the rule of precedent, represents another fundamental precept of common-law adjudication:

---

[55] From *stare decisis et non quieta movere*—to abide by the precedents and not to disturb settled points.

> The idea here expressed is congenial to all law and has been expressed in many forms throughout the whole period of the common law. . . .
>
> . . . Its most frequent and general use is synonymous with the doctrine of precedent as a whole. Its most restricted use is

> *Stare decisis*, briefly stated, makes each judgment a statement of the law, or precedent, binding in future cases before the same court or another court owing obedience to its decisions. It is derived from considerations of stability and equal treatment. Stare decisis has the broadest application of all the relitigation doctrines, in the sense that it applies not only to the parties in the particular case and those in privity with them, but also to strangers to the litigation. It deals only with law, as the facts of each successive case must be determined by the evidence adduced at trial, but to a certain extent, it is bounded by the facts that underly the judgment. As applied in a hierarchical system of courts, the duty of a subordinate court to follow the laws as announced by superior courts is theoretically absolute . . . .

1B JAMES W. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.401, at I-2 (2d ed. rev. 1993) (footnotes omitted). *Stare decisis* is fundamentally an institutional rule, and within our judicial system, the rule of precedent primarily serves an institutional function.

> [I]t is indisputable that *stare decisis* is a basic self-governing principle within the Judicial Branch, which is entrusted with the sensitive and difficult task of fashioning and preserving a jurisprudential system that is not based upon 'an arbitrary discretion.' The Federalist, No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton).....

Patterson v. McLean Credit Union, 491 U.S. 164, 172, 109 S.Ct. 2363, 2370, 105 L.Ed.2d 132 (1989) (citations omitted). "*Stare decisis* is the preferred course because it promotes the evenhanded, predictable, and consistent

---

to indicate the "authoritative" element of the doctrine of precedent.

Leon Green, *The Development of the Doctrine of Stare Decisis and the Extent to Which It Should Be Applied*, 40 ILL.L.REV. 303, 303 n. 1 (1946) (citations omitted).

development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827, 111 S.Ct. 2597, 2609, 115 L.Ed.2d 720 (1991).

Stare decisis affects parties because it binds the courts before whom they appear to present their claims to follow decisions of the superior courts in the judicial heirarchy. Under this principle, "there is a general presumption that settled issue of law will not be reexamined. This presumption is fortified in the federal system by the three-tier court structure, in which the Supreme Court has a largely discretionary jurisdiction, with inferior courts that owe strict obedience to its decisions." 1B MOORE'S FEDERAL PRACTICE, *supra*, ¶ 0.402[3.—1], at I-50—I-51. Under *stare decisis*, "Courts are as a general matter in the business of applying settled principles and precedents of law to the disputes that come to bar. . . . Where those principles and precedents antedate the event on which the dispute turns, the court merely applies legal rules already decided, . . ." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 534, 111 S.Ct. 2439, 2442, 15 L.Ed.2d 481 (1991) (opinion of Souter, J.) (citation omitted).

Generally, a question " 'distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties,' " as the Supreme Court explained in *Montana*, already quoted above. 440 U.S. at 153, 99 S.Ct. at 973 (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49, 18 S.Ct. 18, 27, 42 L.Ed. 355 (1897)). "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *Commissioner v. Sunnen*, 333 U.S. 591, 597[, 68 S.Ct. 715, 719, 92 L.Ed. 898] (1948); *Cromwell v. County of Sac*, 94 U.S. 351, 352-353[, 24 L.Ed. 195] (1877)." *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 398, 101 S.Ct. 2424, 2427, 69 L.Ed.2d 103 (1981).

> We have stressed that "[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, 'of public policy and of private peace,' which should be cordially regarded and enforced by the courts. . . ." *Hart Steel Co. v. Railroad Supply Co.*, 244 U.S. 294, 299, 37 S.Ct. 506, 507, 61 L.Ed. 1148 (1917).

Id. at 401, 101 —S.Ct. at 2429.

In this case, however, the State of Utah proved successful in relitigating the Uintah Reservation boundary issue and obtaining a more favorable outcome against other parties in another forum—first before the Utah Supreme Court in *Perank, Hagen* and *Coando*, and then before the United States Supreme Court in *Hagen*. That having occurred, the State and Local Defendants now dispute the initial determination of the issue in *Ute Indian Tribe* as among these parties. According to the defendants, *Hagen* sets one fundamental precept of common-law adjudication, *stare decisis*, on a collision course with another fundamental precept, the *finality* of a judgment. *Stare decisis* ensures uniform compliance with the Supreme Court's determinations of questions of federal law. Finality ensures the conclusive resolution of disputes among the parties to a lawsuit. The defendants insist that in this context, finality must give way to uniformity.

From the plaintiff Ute Indian Tribe's standpoint, perhaps the most disquieting aspect of the defendants' position is the suggestion that the scope and extent of the tribe's jurisdictional authority—and to some extent its destiny as a governmental entity—may be decisively resolved in proceedings in which the Ute Indian Tribe itself was denied the opportunity to participate as a party, even though the Tribe had already litigated that question and obtained a final judgment deciding the issue—a final judgment ostensibly binding the State and the local governments who particiapted in that litigation as parties. The

Tribe would insist that in this context, uniformity must give way to finality.

In our system of common-law adjudication, when precedent changes the law in some resepct, a question may arise as to whom the new rule applies. "[A] decision may be made fully retroactive, applying both to the parties before the court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations"—a practice that "is overwhelmingly the norm," (*James B. Beam Distilling Co. v. Georgia*, 501 U.S. at 535, 111 S.Ct. at 2443 (opinion of Souter, J.)), or a court may prescribe that the change have a more limited, even purely prospective effect. *See, e.g., Northern Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 88, 102 S.Ct. 2858, 2880, 73 L.Ed.2d 598 (1982) (opinion of Brennan, J.). Generally, however, when the Court decides a case and applies a new legal rule to the parties before it, "it and other courts must treat that same (new) legal rule as 'retroactive,' applying it, for example, to *all pending cases*, . . ." *Reynoldsville Casket Co. v. Hyde*, —— U.S. ——, ——, 115 S.Ct. 1745, 1748, 131 L.Ed.2d 820 (1995) (emphasis added) (citing *Harper v. Virginia Dept. of Taxation*, 509 U.S. 86, 113 S.Ct. 2510, 125 L.Ed.2d 74 (1993)).

A new precedent normally does not nullify prior judgments binding parties as to claims or issue already presented, decided, and resolved—as to cases no longer pending. *Stare decisis* does not operate so as to unravel the intricate tapestry of individual judgments already made final each time a new decision is announced. There are acknowledged limits to a new precedent's retroactive effect:

> Of course, retroactivity in civil cases must be limited by the need for finality, see *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371[, 60 S.Ct. 317, 84 L.Ed. 329] (1940); once a suit is

> barred by res judicata . . . a new rule cannot reopen the door already closed. It is true that one might deem the distinction arbitrary, . . .: why should someone whose failure has otherwise become final not enjoy the next day's new rule, from which victory would otherwise spring? . . . Insofar as equality drives us, it might be argued that the new rule should be applied to those who had toiled and failed, but whose claims are now precluded by res judicatas; . . .
>
> . . . While those whose claims have been adjudicated may seek equality, a second chance for them could only be purchased at the expense of another principle. " 'Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of that contest, and that matters once tried shall be considered forever settled as between the parties.' " *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 401[, 101 S.Ct. 2424, 2429, 69 L.Ed.2d 103] (1981) (quoting *Baldwin v. Iowa State Traveling Men's Assn.*, 283 U.S. 522, 525[, 51 S.Ct. 517, 518, 75 L.Ed. 1244] (1931)). Finality must thus delimit equality in a temporal sense, and we must accept as a fact that the argument for uniformity loses force over time
>
> . . . .

James B. Beam Distilling Co. v. Georgia, 501 U.S. at 541, 542, 111 S.Ct. at 2446, 2447 (opinion of Souter, J.) Citations omitted).

The State of Utah and indeed, the city and county defendants, routinely enjoy the benefit of the constraints imposed on the operation of *stare decisis* by considerations of finality—the idea that after final judgment, "a new rule cannot reopen the door already closed." *Id.* at 541, 111 S.Ct. at 2446. They rest confident in the knowledge, for example, that a myriad of prior state criminal convictions will not be reopened each time the United States Supreme Court adopts a new reading of constitu-

tional criminal procedure. *See generally Griffith v. Kentucky*, 479 U.S. 314, 328, 107 S.Ct. 708, 716, 93 L.Ed.2d 649 (1987) (new rules apply retroactively to all criminal cases pending on direct review); *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989) (new rule will not relate back to govern state convictions challenged on habeas corpus).

Most recently, following nearly identical principles, the Tenth Circuit concluded that *Hagen* does not apply retroactively to invalidate prior federal convictions involving offense conduct occurring within the limits of the Uintah Reservation as defined in *Ute Indian Tribe*. In *United States v. Cuch*, 79 F.3d 987 (10th Cir.1996), the court of appeals affirmed Judge Sam's denial of post-conviction collateral review[56] sought by individual Indian offenders who argued that because their crimes took place within the "opened" portion of the Uintah Reservation (*e.g.*, in Roosevelt, Utah), their convictions were void for lack of jurisdiction under *Hagen* and their sentences should therefore be vacated pursuant to 28 U.S.C. § 2255 (1994).

Judge Stephen Anderson, writing for the Tenth Circuit in *Cuch*, read *Hagen* to this effect: "the Supreme Court held that the state had jurisdiction to prosecute Hagan because Congress had diminished the Uintah Reservation in the early 1900s," and as a result, "[t]he *Hagen* decision effectively overruled the contrary conclusion reached in the *Ute Indian Tribe* case, redefined the Reservation boundaries resulting from our earlier decision, and conclusively settled the question." *Cuch*, 79 F.3d at 989. Nevertheless, the court of appeals declined to vacate the movants' sentences:

> The argument that a jurisdictional ruling such as *Hagen* should not be applied retroactively to cases on collateral review is based on principles of finality and fundamental fairness. As the Court emphasized in

---

[56] *See United States v. Cuch*, 875 F.Supp. 767 (D.Utah 1995).

> *Teague v. Lane*, 489 U.S. 288, 309[, 109 S.Ct. 1060, 1074, 103 L.Ed.2d 334] (1989), "the principle of finality . . . is essential to the operation of our criminal justice system." Consequently,
>
> > "[t]he interest in leaving concluded litigation in a state of repose . . . may quite legitimately be found by those responsible for defining the scope of the writ to outweigh in some, many, or most instances the competing interest in readjudicating convictions according to all legal standards in effect when a habeas petition is filed."
>
> *Id.* at 306[, 109 S.Ct. at 1073] (quoting *Mackey v. United States*, 401 U.S. 667, 683, 91 S.Ct. 1171, 1175, 28 L.Ed.2d 388 (1971) (Harlan, J., concurring in judgments in part, dissenting in part)). *Hagen* was decided after these movants' convictions became final. Its result "was not dictated by precedent existing at [that] time." *Id.* at 301, 109 S.Ct. at 1070 (emphasis omitted). Thus, its holding should not provide the basis for collateral attack in these cases. *See Gilmore v. Taylor*, 508 U.S. 333, 338, 113 S.Ct. 2112, 2116, 124 L.Ed.2d 306 (1993); . . .

Id. at 991 (footnotes & citations omitted).[57] Clearly, the principle of finality played a decisive role in the court's reasoning in *Cuch:*

> We emphasize that these are cases on collateral review. The convictions are final. Direct appeal times have passed. Furthermore, the federal courts were the only tribunals available, both pursuant to our decisions and by intergovernmental pact. The state of

---

[57] Quoting *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6, 107 S.Ct. 708, 712 n. 6, 93 L.Ed.2d 649 (1987), the court of appeals elaborated: " 'By "final," we mean a case in which a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied.' " *Cuch*, 79 F.3d at 991 n. 9.

> Utah was barred from prosecuting such crimes from 1976 to 1994 by state stipulations and orders, federal injunctions, and *conclusive federal litigation to which it was a party*. Case law binding the state, affirmed by this court sitting *en banc*, with certiorari denied by the Supreme Court, required exclusive federal jurisdiction. . . .

Id. at 992 (emphasis added).[58]

---

[58] The court of appeals also addressed the view expressed by a magistrate judge *in Cuch* "that *Hagen* did not effect a 'change' in federal law, but merely clarified what had been the law all along," that *Ute Indian Tribe* " 'made an erroneous interpretation of federal law,' " that " 'Congress had already defined the limits of federal jurisdiction' " and that " '[i]t was the inability to see the jurisdictional line drawn by Congress that created the problem.' " *Cuch*, 79 F.3d at 994.

> The magistrate judge's analysis partakes of the Blackstonian common law view that courts do no more than discover the law. *Linkletter v. Walker*, 381 U.S. 618, 622-23[, 85 S.Ct. 1731, 1733-34, 14 L.Ed.2d 601] (1965). "The Blackstonian view ruled English jurisprudence and cast its shadow over our own "through much of our jurisprudential history. *Id.* at 624[, 85 S.Ct. at 1734-35]. But American law drawing, as it does from experience, gradually recognized that "such a rule was out of tune with actuality." *Id.; see also* id. at 629[, 85 S.Ct. at 1737]. In time the Supreme Court admitted that "[t]he past cannot always be erased by a new judicial declaration," *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374[, 60 S.Ct. 317, 318, 84 L.Ed. 329] (1940). "Questions of rights claimed to have become vested, of status, of prior determinations deemed to have finality and acted upon accordingly, of public policy in the light of the nature both of the statute and of its previous application, demand examination." *Id.* In short, while a judicial decision is in effect, "it is . . . an existing juridical fact." *Linkletter*, 381 U.S. at 624[, 85 S.Ct. at 1734-35] (discussing Austinian view).
>
> This latter view is now firmly established in the federal courts. . . .

Id. at 994-95. *Cuch* further notes that "[w]hile later cases have overruled the specific retroactivity test announced in *Linkletter*, *see, e.g., Griffith v. Kentucky*, 479 U.S. 314[, 107 S.Ct. 708, 93 L.Ed.2d

Without addressing the principle of finality or its effect on *stare decisis*, the State and Local Defendants argue that a Supreme Court decision finding diminishment of reservation boundaries (*e.g., Hagen*) may have binding effect under *stare decisis* even absent the affected tribe's participation. Indeed, of the six Supreme Court reservation boundary cases cited by the defendants, only *Rosebud Sioux Tribe v. Kneip* joined both tribal and state governments in the same litigation. Defendants' Memorandum at 8-9 & nn. 6-7.[59]

At the same time, however, none of the referenced cases *relitigated* a reservation boundary issue after it had already been decided in prior litigation directly involving the affected tribal, state, and local governments as parties.[60] With the exception of the Rosebud Sioux Tribe, none of the affected tribes in *Solem, DeCoteau, Mattz, Seymour*, or *Pelican* appear to have taken affirmative steps to obtain declaratory relief concerning reservation bound-

---

649] (1987), the cases have continued to recognize the validity of *Linkletter*'s underlying premise. . . ." *Id.* at 995 n. 16 (citations omitted).

[59] *See Solem v. Bartlett*, 465 U.S. 463, 104 S.Ct. 1161, 79 L.Ed.2d 443 (1984); *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584, 97 S.Ct. 1361, 51 L.Ed.2d 660 (1977); *DeCoteau v. District County Court*, 420 U.S. 425, 95 S.Ct. 1082, 43 L.Ed.2d 300 (1975); *Mattz v. Arnett*, 412 U.S. 481, 93 S.Ct. 2245, 37 L.Ed.2d 92 (1973); *Seymour v. Superintendent*, 368 U.S. 351, 82 S.Ct. 424, 7 L.Ed.2d 346 (1962); *United States v. Pelican*, 232 U.S. 442, 34 S.Ct. 396, 58 L.Ed. 676 (1914).

[60] The most analogous case in that regard, *Solem*, addressed the reservation boundary issue in the context of a federal habeas corpus proceeding, reaching a result that was inconsistent with two prior state appellate decisions, *State v. Janis*, 317 N.W.2d 133 (S.D.1982), and *Stankey v. Waddell*, 256 N.W.2d 117 (S.D.1977). 465 U.S. at 465-466 & n.4, 104 S.Ct. at 1161-64 & n. 4. While the Cheyenne River Sioux Tribe filed *amicus curiae* briefs in all three cases, it was not joined as a party to any one of them; the state was a party in *Solem* and *Janis*, both of which arose out of state criminal prosecutions.

aries before the Supreme Court ruled. Here, the Ute Indian Tribe plainly had obtained such affirmative relief in advance of *Hagen*.

While the Tenth Circuit reads *Hagen* as "effectively overrul[ing] the contrary conclusion reached in the *Ute Indian Tribe* case, redefin[ing] the Reservation boundaries resulting from our earlier decision, and conclusively settl[ing] the question," (*Cuch*, 79 F.3d at 989), it does not afford the new precedent unlimited reach. *Cuch* explicitly holds that *Hagen* does not operate to reopen final judgments in criminal cases in the context of collateral review under 28 U.S.C. § 2255.

The case law cited by the Utah Supreme Court in footnote 3 of *Perank* as suggesting that the State of Utah was *not* collaterally estopped from relitigating the boundary issue as against *different* parties in *Perank*, *Hagen* and *Coando*, seems to state as firmly that the State *is* collaterally estopped from relitigating the boundary issue as against the Ute Indian Tribe. In *United States v. Mendoza*, 464 U.S. 154, 104 S.Ct. 568, 78 L.Ed.2d 379 (1984), cited in *Perank*, 858 P.2d at 931 n. 3, the Supreme Court points out that "where the parties are the same, estopping the Government spares a party that has already prevailed once from having to relitigate. . . ." 464 U.S. at 164, 104 S.Ct. at 574. In *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 104 S.Ct. 575, 78 L.Ed.2d 388 (1984), also cited in *Perank*, the Court held that mutual collateral estoppel precluded the Environmental Protection Agency from relitigating the application of provisions of the Clean Air Act to inspections of a Stauffer plant in Tennessee where Stauffer had prevailed in litigating the same issue in a prior Tenth Circuit case involving EPA inspection of a Stauffer plant in Wyoming: "the doctrine of mutual defensive collateral estoppel is applicable against the Government to preclude relitigation of the same issue already litigated against the same party in another case involving virtually identical facts."

464 U.S. at 165, 104 S.Ct. at 575. "As commonly explained," *Stauffer Chemical* noted, "the doctrine of collateral estoppel can apply to preclude relitigation of both issues of law and issues of fact if those issues were conclusively determined in a prior action." *Id.* at 170-71, 104 S.Ct. at 578-79. The policy argument noted in *Perank, viz.*, that it may be preferable to allow relitigation by the State as to "a decision on an issue of such substantial public importance that will inevitably recur, . . . even if res judicata were otherwise applicable against the State," (858 P.2d at 931 n. 3), proves to be an argument "persuasive only to prevent the application of collateral estoppel against the Government in the absence of mutuality. When estoppel is applied in a case where the Government is litigating the same issue arising under virtually identical facts against the same party, as here, the Government's argument loses its force." *Stauffer Chemical,* 464 U.S. at 173, 104 S.Ct. at 579-80.

At least as to parties with whom the State has litigated and lost, the State is not free to "litigat[e] the same issue arising under virtually identical facts against the same party" over and over again until it obtains a more favorable result.[61] While the res judicata and collateral estoppel doctrines do not carry the compelling force of a constitutional requirement, the common wisdom that litigants are rightfully entitled to have but *one* "bite at the apple" reflects the important societal values intrinsic in the *finality* of court judgments, even in instances of litigation among

---

[61] The same idea finds expression in, *e.g.*, the Double Jeopardy Clause of the Fifth Amendment. *See, e.g., Green v. United States,* 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957) ("The underlying idea, one that is deeply ingrained in at least the Anglo-American system of jurisprudence, is that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, . . .").

competing sovereigns.[62] As the United State Supreme Court observed in *Montana v. United States* (a case involving litigation between sovereigns), the doctrines of res judicata and collateral estoppel remain "central to the purpose for which civil courts have been established, *the conclusive resolution of disputes within their jurisdictions.*" 440 U.S. at 153, 99 S.Ct. at 973 (emphasis added).

(c) Collateral Estoppel and Reservation Boundary Litigation

Some guidance as to the role of collateral estoppel in reservation boundary litigation may be gleaned from *White Earth Band of Chippewa Indians v. Alexander,* 518 F. Supp. 527 (D.Minn.1981), *affirmed,* 683 F.2d 1129 (8th Cir.1982), *cert. denied sub nom. Counties of Mahnomen and Clearwater, Minnesota v. White Earth Band of Chippewa Indians, and Alexander v. White Earth Band of Chippewa Indians,* 459 U.S. 1070, 103 S.Ct. 488, 489, 74 L.Ed.2d 631 (1982). In *White Earth Band,* the Band filed a complaint in federal district court in 1974, seeking declaratory and injunctive relief against state officials and the State of Minnesota regarding competing claims of jurisdiction over the White Earth Chippewa Reservation located within that State. Three Minnesota counties and four individuals intervened. 683 F.2d at 1132.

In *State of Minnesota v. Clark,* 282 N.W.2d 902 (Minn. 1979), *cert. denied,* 445 U.S. 904, 100 S.Ct. 1080, 63 L.Ed.2d 320 (1980), the Minnesota Supreme Court de-

---

[62] Absent some measure of finality, the Tribe would have accomplished essentially nothing by seeking and obtaining a final judgment granting relief under the Declaratory Judgments Act, 28 U.S.C. § 2201 (1994), in an attempt to resolve the boundary issue more than two decades ago. Such a result would plainly frustrate the purpose of the Declaratory Judgment Act, a remedy well suited to a controversy such as this. *See* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 100, at 713-14 (5th ed. 1994) (the Act "creates a means by which rights and obligations may be adjudicated in cases involving an actual controversy that has not reached the stage at which either party may seek a coercive remedy, . . .").

termined that the White Earth Chippewa Reservation was not disestablished by 1889 allotment legislation which, *inter alia,* provided for cession of four of the reservation's thirty-six townships, or approximately 92,000 acres. 282 N.W.2d at 908. The *White Earth Band* litigation meanwhile had been "held in abeyance by agreement of the parties and with court approval" while the *Clark* litigation (involving criminal prosecution of White Earth Band members on the theory that the reservation had been disestablished) proceeded through the state courts. 683 F.2d at 1132-1133. Relying on *Clark,* the district court in *White Earth Band* held that the reservation was "diminished" to the extent of the four-township cession, but that the remaining thirty-two township reservation continued to exist. 518 F.Supp. at 534. The district court entered an order precluding "further litigation of the disestablishment issue as it affected the thirty-two townships and issued a permanent injunction prohibiting the state from enforcing its gaming laws against Band members within the thirty-two townships." 683 F.2d at 1133.

On appeal from the district court's preclusion order, the state, county, and individual parties asserted that a significant change in the law rendered collateral estoppel inapplicable to the disestablishment issue and further, that "the collateral estoppel bar should not be applied because the purposes of the doctrine are not met in this case." *Id.* at 1134. The Eighth Circuit rejected both arguments, declaring that "further inquiry into the status of the thirty-two township area would result in needless litigation." Id. at 1135 (citing *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 326, 99 S.Ct. 645, 649, 58 L.Ed.2d 552 (1979)).

> In the present case the parties agree that the technical requirements of collateral estoppel are satisfied pursuant to the four-part analysis of *Oldham v. Pritchett,* 599 F.2d 274 (8th Cir.1979). According to the *Oldham* court, collateral estoppel is appropriate where:

> (1) the issue . . . [is] . . . identical to one in a prior adjudication; (2) there was a final judgment on the merits; (3) the estopped party was a party or in privy with a party to the prior adjudication; and (4) the estopped party was given a full and fair opportunity to be heard on the adjudicated issue.

Id. at 279.

. . . .

> . . . Assuming arguendo that the disestablishment issue is a question of law, the "legal change" exception to collateral estoppel is not available here because the court in *Clark* had *DeCoteau, Rosebud,* and *United States v. Minnesota*[, 466 F.Supp. 1382 (D.C. Minn.1979)] before it when it found that the Nelson Act had not disestablished the thirty-two townships. The *Clark* court applied the correct standard to resolve the disestablishment issue. . . .
>
> . . . .
>
> . . . [R]eopening litigation of this particular disestablishment issue would not minimize the possibility of differing adjudications on disestablishment issues. The Nelson Act treated various bands or tribes and reservations differently, . . . and contemplated that a separate agreement would be negotiated with individual bands or tribes pursuant to the Act. . . . When a court has determined disestablishment of a given reservation in its particular historical and factual setting, prevention of inconsistent adjudication becomes desirable insofar as it fosters reliance on judicial decision making.

683 F.2d at 1134, 1135 (citations omitted). The Eighth Circuit concluded that the district court "did not abuse its discretion in finding that the counties had a full and fair opportunity to litigate their claims in *Clark* and are collaterally estopped from relitigating the question of disestablishment." *Id.* at 1135.

As *White Earth Band* demonstrates, collateral estoppel may operate to preclude relitigation of an Indian reservation boundary issue by state and local governments where a court has already determined the issue "in its particular historical and factual setting" and where those entities "had a full and fair opportunity to litigate their claims." The policies underpinning collateral estoppel—" 'protecting litigants from the burden of relitigating an identical issue with the same party . . . and . . . preventing needless litigation' " (*id.* at 1133 (quoting *Parklane Hosiery*, 439 U.S. at 326, 99 S.Ct. at 649)—are no less meaningful in the context of reservation diminishment cases than in other kinds of litigation, particularly where the affected governmental entities have been participating as parties.[63]

(d) Collateral Estoppel and "Controlling Legal Principles"

The State and Local Defendants assert in this case that the doctrine of collateral estoppel "has no application where there has been an intervening change in legal principles." Defendants' Memorandum at 10. Yet cases such as *Stauffer Chemical* appear to draw a distinction between the announcement of general rules of law—"controlling legal principles"—and more particularized findings applying legal rules to specific facts. In *Montana v. United States*, the Court rejected the Government's position that "controlling legal principles" had changed, excepting that litigation from the collateral estoppel effect of a prior Montana Supreme Court ruling; in fact, the Government's

[63] Parties would be ill-advised to read *Hagen* as an open invitation to relitigate issues already determined in litigation in which they have participated, where the disposition of the issues has been incorporated into a final judgment of this court, the United States Court of Appeals for the Tenth Circuit, or any other court of competent jurisdiction. Where a party has come into court seeking judicial resolution of a dispute, merely characterizing an issue as one of "substantial public importance" gives no party *carte blanche* to disregard the court's judgment altogether and attempt to relitigate the same issue either in another lawsuit or another forum.

own pleadings in that case "suggest[ed] the absence of any major doctrinal shifts since the Montana Supreme Court's decision." 440 U.S. at 161-162, 99 S.Ct. at 977-978.

> Because the factual and legal context in which the issues of this case arise has not materially altered since [Peter Kiewit Sons' Co. v. State Bd. of Equalization] *Kiewit I,* [161 Mont. 140, 505 P.2d 102 (1973),] normal rules of preclusion should operate to relieve the parties of "redundant litigation [over] the identical question of the statute's application to the taxpayer's status." *Tait v. Western Maryland R. Co.,* 289 U.S. 620, 624[, 53 S.Ct. 706, 707, 77 L.Ed. 1405] (1933). . . .

Id. at 162, 99 S.Ct. at 978 (citation omitted). The Court also rejected the assertion that collateral estoppel did not apply in *Montana* because the Government had raised " 'unmixed questions of law' in successive actions involving substantially unrelated claims." *Id.* Quoting *United States v. Moser,* 266 U.S. 236, 242, 45 S.Ct. 66, 67, 69 L.Ed. 262 (1924), the Court further stated, " '[A] *fact, question* or *right* distinctly adjudged in the original action cannot be disputed in a subsequent action, even though the determination was reached upon an erroneous view or by an erroneous application of the law.' " *Id.* (emphasis added by the Court).

Stauffer Chemical also discussed the "unmixed question of law" exception, admitting "uncertainty as to its application." 464 U.S. at 171, 104 S.Ct. at 578. However, "for the purpose of determining when to apply an estoppel," the Court agreed that

> "[w]hen the claims in two separate actions between the same parties are the same or are closely related . . . it is not ordinarily necessary to characterize an issue as one of fact or of law for purposes of issue preclusion. . . . In such a case, it is unfair to the winning party and an unnecessary burden on the courts to allow repeated litigation of the same issue

> in what is essentially the same controversy, even if the issue is regarded as one of 'law'." Restatement (Second) of Judgments § 28, Comment *b* (1982).

Id. (footnote omitted).

In the context of this litigation, *Hagen* does not purport to alter or depart from the "fairly clean analytical structure" established by "[o]ur precedents in the area"—the three-factor approach articulated in *Solem v. Bartlett,* 465 U.S. 463, 469-71, 104 S.Ct. 1161, 1165-67, 79 L.Ed.2d 443 (1984). *Hagen,* 510 U.S. at 408-09, 114 S.Ct. at 964. *Hagen* works no deliberate change in "controlling legal principles," if understood to refer to general rules of law. Any "change" wrought by *Hagen* must be found in the *application* of the *Solem* analysis to the "particular historical and factual setting" of the Uintah Reservation—"what is essentially the same controversy, even if the issue is regarded as one of 'law'," as was decided among these parties more than ten years ago in *Ute Indian Tribe.*

Be that as it may, this court need not determine *Ute Indian Tribe*'s "validity for collateral estoppel purposes" (Defendants' Memorandum at 24) in this proceeding. Here, the question of *Ute Indian Tribe*'s finality or conclusiveness does not arise in a collateral proceeding, to be decided according to the doctrine of collateral estoppel. It arises from a much more immediate and fundamental source.

The "Mandate Rule"

"Law of the case" rules have developed "to maintain consistency and avoid reconsideration of matters once decided during the course of a single continuing lawsuit." 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURES § 4478, at 788 (1981).

> Of these rules, the most compelling is the mandate rule. This fundamental rule binds every court to

> honor rulings in the case by superior courts. As the Supreme Court has stated, "In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court." *Briggs v. Pennsylvania R. Co.*, 334 U.S. 304, 306, 68 S.Ct. 1039, 1040, 92 L.Ed. 1403 (1948). The statutory authority for the power of the appellate courts dates from the first Judiciary Act of 1789 and is now found in 28 U.S.C. § 2106.

Casey v. Planned Parenthood of Southeastern Pennsylvania, 14 F.3d 848, 856 (3d Cir. 1994) (footnotes omitted).[64] "The so-called 'mandate rule' is simply a subspecies of the venerable 'law of the case' doctrine, a staple of our common law as old as the Republic. . . ." *Federated Rural Electric Insurance Corp. v. Arkansas Electric Cooperatives, Inc.*, 896 F.Supp. 912, 914 (E.D.Ark. 1995) (citation omitted).

> Whatever was before the [superior] Court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case; and must carry it into execution, according to the mandate. They cannot vary it, or examine it for any other purpose than execution; nor give any other or further relief; nor review it upon any matter decided on appeal, for error apparent; nor intermeddle with it, further than to settle so much as has been remanded.

Sibbald v. United States, 37 U.S. (12 Pet.) 488, 492, 9 L.Ed. 1167 (1838). Indeed, "the rule has remained

---

[64] 28 U.S.C. § 2106 (1994) provides:

> The Supreme Court or any other court of appellate jurisdiction may affirm, modify, vacate, set aside or reverse any judgment, decree or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.

essentially unchanged in nearly one hundred and fifty years":

> It is axiomatic that on remand for further proceedings after decision by an appellate court, the trial court must proceed in accordance with the mandate and the law of the case as established on appeal.
>
> A trial court must implement both the letter and spirit of the mandate, taking into account the appellate court's opinion and the circumstances it embraces.

Casey v. Planned Parenthood of Southeastern Pennsylvania, 14 F.3d at 857 (quoting *Bankers Trust Co. v. Bethlehem Steel Corp.*, 761 F.2d 943, 949 (3d Cir.1985) (citations omitted)). "The rule ensures 'careful observation of [the] allocation of authority' established by the three-tier system of federal courts which 'is necessary for a properly functioning judiciary.'" *Id.* (quoting *Litman v. Massachusetts Mut. Life Ins. Co.*, 825 F.2d 1506, 1508 (11th Cir.1987)).

In this Circuit, "The rule is well established that a district court must comply strictly with the mandate rendered by the reviewing court. *See Laffey v. Northwest Airlines, Inc.*, 642 F.2d 578, 584-85 (D.C.Cir.1980) (district court has 'no power to reconsider issues laid to rest' on prior appeal)." *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America,* 962 F.2d 1528, 1534 (10th Cir.), *cert. denied,* 506 U.S. 956, 113 S.Ct. 414, 121 L.Ed.2d 337 (1992). *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1553 (10th Cir. 1991), *cert. denied,* 504 U.S. 910, 112 S.Ct. 1941, 118 L.Ed.2d 547 (1992) ("Among the law of the case rules is the obligation of every court to honor the rulings of a court that stands higher in the hierarchical judicial structure. 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure,* § 4478 at 788.").

> The "law of the case" doctrine requires every court to follow the decisions of courts that are higher in

> the judicial hierarchy. *Mason v. Texaco, Inc.*, 948 F.2d 1546, 1553 (10th Cir.1991), *cert. denied*, [504] U.S. [910], 112 S.Ct. 1941, 118 L.Ed.2d 547 (1992); *Heathcoat v. Potts*, 905 F.2d 367, 370 (11th Cir.1990); see generally 18 Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, Federal Practice and Procedure § 4478 (1993). The doctrine applies to issues previously decided, *Quern v. Jordan*, 440 U.S. 332, 347, n. 18, 99 S.Ct. 1139, 1148, n. 18, 59 L.Ed.2d 358 (1979), either explicitly or by necessary implication. *Heathcoat*, 905 F.2d at 370; *Cherokee Nation v. Oklahoma*, 461 F.2d 674, 678 (10th Cir.), *cert. denied*, 409 U.S. 1039, 93 S.Ct. 521, 34 L.Ed.2d 489 (1972).

Guidry v. Sheet Metal Workers Intern. Ass'n, Local No. 9, 10 F.3d 700, 705-706 (10th Cir.1993). *See generally Anthony v. Baker*, 955 F.2d 1395, 1397 n. 1 (10th Cir. 1992) (law of the case doctrine encompasses both explicit and implicit decisions of reviewing court).

In addressing the scope and effect of the "mandate rule," one must be careful to distinguish the principle from the terminology used to identify it. "Law of the case terminology is often employed to express the principle that inferior tribunals are bound to honor the mandate of superior courts within a single judicial system. . . ." 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478, at 792, 793 (1981) (footnote omitted).[65] Yet the "law of the case" established by a higher court's mandate does not operate according to the same principles as the "law of the case" reflected in a court's own rulings.

> It is often stated that the decision of an appellate court on an issue of law becomes the law of the case on remand. *This application of the doctrine lacks*

---

[65] This litigation belies the remark by Professors Wright, Miller and Cooper that "[t]his principle is so straight-forward as to present few interesting problems." *Id.* at 793.

> *completely the flexibility of the same doctrine as applied to the law decided by the trial court prior to judgment.* In this situation the district court owes obedience to the mandate of the Supreme Court or the court of appeals and must carry it into effect according to its terms. It can be compelled to do so by mandamus, or by a second appeal.

1B JAMES W. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.404[10], at II-58—II-60 (2d ed. rev. 1993) (emphasis added & footnotes omitted). That a district court may alter or abandon its own prior ruling, or "law of the case," does not mean that a district court may alter or ignore an appellate court mandate—even where the reasons for doing so are equally compelling—simply because the mandate is also termed the "law of the case." The principles and policies involved differ, regardless of the sameness of their labeling.

In the context of an appellate court mandate,

> There is some uncertainty whether a lower court must seek permission from an appellate court before departing from the mandate on the ground that intervening changes in the law require re-examination of issues actually decided, but this is more a problem of sound relationships within the judicial hierarchy than a problem of stability within a single proceeding.

18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478, at 793-94 (1981) (footnote omitted). The commentary cites to *Crane Co. v. American Standard, Inc.*, 603 F.2d 244, 248-49 & n. 8 (2d Cir.1979), which in turn cites to *Higgins v. California Prune and Apricot Grower, Inc.*, 3 F.2d 896, 897 (2d Cir.1924), and *Rankin v. Atlantic Maritime Co.*, 117 F.Supp. 253 (S.D.N.Y.1953).

In *Higgins*, the Second Circuit observed that "feeling bound by the mandate of this court" on remand following a prior appeal, the district court had declined—"rightly, as we think"—to consider effect of *Kline v. Burke Constr.*

Co., 260 U.S. 226, 43 S.Ct. 79, 67 L.Ed. 226 (1922), a subsequent Supreme Court decision seeming to lead to a result contrary to the mandate. Judge Learned Hand, writing for the Second Circuit in *Higgins*, continued: "If, however, we are free to reconsider our earlier decision at all, there would seem to be no question of our duty to follow the later decision of the Supreme Court. We think we are so free, . . ." 3 F.2d at 897.

> [I]t is now well settled that the "law of the case" does not rigidly bind a court to its former decisions, but is only addressed to its good sense. . . . There can be surely be no greater reason for changing our views than because the Supreme Court has directly ruled upon the precise point in the interim.

Id. at 898 (citations omitted).[66]

Higgins highlights the critical difference in posture between the court of appeals and the district court in dealing with the effect on a mandate of a later Supreme Court decision: what may be deemed *reconsideration* of an earlier ruling—"changing our views"—at the court of appeals level may well be deemed *noncompliance* if undertaken at the district court level.[67] The difference is one of power.

---

[66] *Accord, Zdanok v. Glidden Co.*, 327 F.2d 944, 951 (2d Cir.) cert. denied, 377 U.S. 934, 84 S.Ct. 1338, 12 L.Ed.2d 298 (1964) ("[I]f, before a case in a district court has proceeded to final judgment, a decision of the Supreme Court demonstrates that a ruling on which the judgment would depend was in error, no principles of 'the law of the case' would warrant a failure on our part to correct the ruling"), *aff'd*, 370 U.S. 530 (1962); *Fogel v. Chestmutt*, 668 F.2d 100, 109 (2d Cir.1981) (considering Supreme Court decision intervening between first and second appeals), *cert. denied*, 459 U.S. 828, 103 S.Ct. 65, 74 L.Ed.2d 66 (1982).

[67] And "[d]isobedient district judges . . . are not infrequently corrected for failure to honor the mandate rule as the law of the case on remand." 18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478, at 792-93 (footnote omitted).

In *Rankin v. Atlantic Maritime Co.*, the question of the effect of a subsequent Supreme Court decision upon a prior court of appeals mandate was raised before the district court, but only *after* a party had sought and obtained leave *at the court of appeals level* for the district court to consider the effect of that more recent Supreme Court ruling:

> While awaiting trial [following remand] the Supreme Court on May 25, 1953 decided *Lauritzen v. Larsen*, [345 U.S. 571, 73 S.Ct. 921, 97 L.Ed. 1254], whereupon defendant sought and obtained an order in the Court of Appeals granting leave to this court to entertain "a certain motion in this cause". Defendant now moves to dismiss. . . .
>
> . . . .
>
> Plaintiff urges that the doctrine of *res judicata* precludes decision of the instant motion. The 'law of the case' obstacle, which would otherwise have precluded a decision of this motion, was removed by the order of the Court of Appeals granting permission to this court to entertain it. I take such order to mean that the Court of Appeals intended that the motion be decided on the merits with the guidance of the Larsen decision. Otherwise, the appellate court's entertainment of that motion would have been a futile gesture.

117 F.Supp. at 254 (footnote omitted).

The "law of the case" as reflected in a court's own rulings involves a question of practice, not one of power. "A court that makes a decision has the *power* to reconsider it, so long as the case is within its jurisdiction." 1B MOORE'S FEDERAL PRACTICE ¶ 0.404[1], at II-2 (emphasis in original). *See, e.g., Mason v. Texaco, Inc.*, 948 F.2d 1546, 1553 (10th Cir.1991), *cert. denied*, 504 U.S. 910, 112 S.Ct. 1941, 118 L.Ed.2d 547 (1992). The "law of the case" as reflected in a court of appeals' mandate necessarily represents an exercise of supervisory

power of the appellate tribunal over the lower court. "[A]fter the law of the case is determined by a superior court, the inferior court lacks authority to depart from it, and any change must be made by the superior court that established it, or by a court to which it, in turn, owes obedience." 1B MOORE'S FEDERAL PRACTICE ¶ 0.404[1], at II-2—II-3.

Exceptions to the Mandate Rule?

The command given by the mandate rule seems clear: follow the mandate. Nevertheless, some courts relying on "law of the case" terminology "have recognized a few exceptions which might allow a matter to be revisited."

> They are (1) the availability of new evidence, (2) an intervening change of controlling law, or (3) the need to correct a clear error or prevent manifest injustice. *E.g., In re Progressive Farmers Ass'n,* 829 F.2d 651, 655 (8th Cir.1987) (on remand lower court required to follow appellate court decision unless new evidence introduced or decision is clearly erroneous and works manifest injustice); cited in *Bethea v. Levi Strauss,* 916 F.2d 453, 457 (8th Cir.1990).

Federated Rural Electric Insurance Corp. v. Arkansas Electric Cooperatives, Inc., 896 F.Supp. at 914. *See also United States v. Bell,* 988 F.2d 247, 251 & n. 2 (1st Cir. 1993) (as a branch of the law of the case doctrine, the mandate rule "is a discretion-guiding rule subject to an occasional exception in the interests of justice"); *Thomas v. Bible,* 983 F.2d 152, 155 (9th Cir.1993) ("None of the recognized grounds justifying departure from a court of appeals' mandate under the preclusive doctrine of "law of the case," (*e.g.*, newly discovered evidence, an intervening change in governing law) are present here."); *Cameo Convalescent Center, Inc. v. Percy,* 800 F.2d 108, 110 (7th Cir.1986) (where court of appeals' decision

issued one day before Supreme Court decision that changed the law, "the district court properly applied the new law to the claim before it."); *Piambino v. Bailey*, 757 F.2d 1112, 1119-20 (11th Cir. 1985), *cert. denied*, 476 U.S. 1169, 106 S.Ct. 2889, 90 L.Ed.2d 976 (1986). In *Leggett v. Badger*, 798 F.2d 1387 (11th Cir.1986), the Eleventh Circuit expressed the view that the mandate rule,

> usually referred to as the "law of the case" doctrine, has three exceptions that allow a federal district court to act contrary to the appellate decision: (1) when new and substantially different evidence is presented subsequent to the appeal; (2) when controlling authority has been rendered, contrary to the law of the appellate decision; (3) when the prior decision was clearly erroneous and would work a manifest injustice if implemented. *Stanley v. United States*, 786 F.2d 1490, 1498 (11th Cir.1986).

798 F.2d at 1389 (footnote omitted). *Leggett* affirmed that "the district court . . . correctly declined to enforce our mandate" in light of a subsequent Supreme Court decision to the contrary. *Id.* at 1390. Even so, the *Leggett* panel "note[d] the need to read and apply these exceptions narrowly. A district court should follow the law of the case as decided by the appellate court unless the court is certain that one of the three specifically and unquestionably applies." *Id.* at 1389 n. 2.[68]

The Eleventh Circuit has also approved a district court's departure from its mandate in light of an intervening change in controlling state law. *Ad-Vantage Telephone*

---

[68] The Seventh Circuit has emphasized the narrowness of one such exception in more colorful terms: "To be clearly erroneous, a decision must . . . strike us as wrong with the force of a five-week-old, unrefrigerated dead fish. To be clearly erroneous, then, the . . . decision must be dead wrong, and we do not believe it is." *Parts & Electric Motors, Inc. v. Sterling Electric, Inc.*, 866 F.2d 228, 233 (7th Cir.1988), *cert. denied*, 493 U.S. 847, 110 S.Ct. 141, 107 L.Ed.2d 100 (1989).

Directory Consultants v. GTE Directories Corp., 943 F.2d 1511, 1520 (11th Cir.1991). While expressing a willingness to follow intervening state court decisions in the context of a remand for trial (*e.g., Menne v. Celotex Corp.*, 861 F.2d 1453, 1475 n. 38 (10th Cir.1988)), the Tenth Circuit specifically rejected a similar suggestion by the defendant in *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 962 F.2d 1528, 1534 (10th Cir.), *cert. denied*, 506 U.S. 956, 113 S.Ct. 414, 121 L.Ed.2d 337 (1992), in the context of a remand for entry of judgment based upon the court of appeals' disposition of the legal issues.

In a prior appeal in the *Colorado Interstate Gas* case, (885 F.2d 683 (10th Cir.1989) ("CIG II")), the Tenth Circuit had issued a mandate instructing the district court "to enter judgment in accordance with the opinion of this court" affirming an $8 million tort award in CIG's applying Wyoming law. Subsequently, the Wyoming Supreme Court decided *Price v. Sorrell*, 784 P.2d 614 (Wyo. 1989), in which it declined to adopt the legal theory relied upon by the Tenth Circuit in affirming CIG's tort claim. The defendant urged that "until such time as a case is no longer *sub judice*, the duty rests upon federal courts to apply state law under the Rules of Decision statute in accordance with the then controlling decision of the highest state court," (*Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543, 61 S.Ct. 347, 350, 85 L.Ed. 327 (1941)), and argued that *Price v. Sorrell*, now a "controlling decision of the highest state court," required dismissal of CIG's tort claim. The Tenth Circuit held to the contrary:

> A suit is deemed " 'pending until the appeal is disposed of,' and until disposition any judgment appealed from it is still *sub judice.*" *de Rodulfa v. United States*, 461 F.2d 1240, 1253 (D.C.Cir.) (quoting *Mackenzie v. A. Engelhard & Sons Co.*, 266 U.S. 131, 142-43, 45 S.Ct. 68, 69 L.Ed. 205 (1924)),

> *cert. denied*, 409 U.S. 949, 93 S.Ct. 270, 34 L.Ed.2d 220 (1972); *Nicastro v. United States*, 206 F.2d 89, 92 (10th Cir.1953). Following appellate disposition, however, the judgment is no longer subject to district court amendment beyond the ministerial dictates of the mandate, which encompasses the full scope of jurisdictional power granted to the district court on remand.
>
> . . . [W]e conclude that the question of which state law properly applied was no longer *sub judice* after this court disposed of the appeal in *CIG II* and the time for a petition for certiorari had passed.

Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America, 962 F.2d at 1534. Moreover, *Colorado Interstate Gas* eschewed the use of a motion for relief from judgment under Fed.R.Civ.P. 60(b) as a means of raising the subsequent state court decision:

> Over thirty years ago, this court held in *Collins* that "[a] change in the law or in the judicial view of an established rule of law is not such an extraordinary circumstance which justifies relief" under Rule 60(b). Id. at 839. . . . The *Collins* holding is still the rule in this circuit. *See Van Skiver v. United States*, 952 F.2d 1241, 1244-45 (10th Cir.1991).

Id. at 1535 (quoting *Collins v. City of Wichita*, 254 F.2d 837, 839 (10th Cir. 1958)).[69] "Thus," the Tenth Circuit concluded, "Natural had no basis on which it could have asked the district court to apply the *Price* case: *this case was already over* for purposes of selecting the governing law." *Id.* (emphasis added). At that point, the district

---

[69] The Tenth Circuit declined to extend an intervening decision of its own in *Pierce v. Cook & Co.*, 518 F.2d 720, 722-23 (10th Cir.1975), which the *Colorado Interstate Gas* panel read as "finding extraordinary circumstances [under Rule 60(b)] where the change in law arose out of the same accident in which plaintiffs had been involved." *Id.*

court was duty bound to conform to the Tenth Circuit's judgment.

The Tenth Circuit Mandate in *Ute Indian Tribe* Remains in Force

The Tenth Circuit's mandate in *Ute Indian Tribe*, received and docketed by this court on December 9, 1986,[70] directs that "the cause is remanded to the United States District Court for the District of Utah for further proceedings in accordance with the opinion of this Court," referring to the Tenth Circuit's *en banc* ruling. Since that ruling decided the boundary question on the merits, leaving no remaining issues to be addressed by this court, *Ute Indian Tribe* was no longer *sub judice*[71] after December 9, 1986. The "further proceedings" contemplated by the mandate amount simply to the enforcement of the court of appeals' judgment. *See Gabaldon v. Westland Development Co., Inc.*, 485 F.2d 263, 266 (10th Cir.1973). ("The mandate was for further proceedings not inconsistent with the views of the Supreme Court. Such 'further proceedings' were, of course, to implement at the local level the ruling of the higher court.")

---

[70] Under Fed.R.App.P. 41(a), "A certified copy of the judgment and a copy of the opinion of the court, if any, and any direction as to costs shall constitute the mandate, unless the court directs that a formal mandate issue." In this instance, this court received a copy of the court of appeals' judgment, dated September 17, 1985 accompanied by a copy of the opinions reflecting the *en banc* decision, also reported at 773 F.2d 1087. Reference in this Memorandum Opinion and Order to the Tenth Circuit's "mandate" embraces both of these documents.

[71] "We note that *sub judice* 'means "under judicial consideration" or in court and not yet decided.' Black's Law Dictionary 1277 (5th ed. 1979). We thus hold that the Supreme Court's denial of certiorari ended this litigation, and the case was not *sub judice* when the defendants made their rule 60(b)(6) motion." *Seese v. Volkswagenwerk, A.G.*, 679 F.2d 336, 337 (3d Cir.1982) (district court denial of Rule 60(b) relief based upon subsequent Fourth Circuit decision affirmed).

This court has identified no reported Tenth Circuit case permitting a district court within the Tenth Circuit to ignore the court of appeals' mandate because in the district court's mind, its judgment is inconsistent with subsequent Supreme Court precedent.[72] The court has found one reported suggestion that a district court may depart from a Tenth Circuit mandate in light of new and different evidence, but that suggestion was made in the context of a retrial after remand, while the matter still remained *sub judice:*

> In *Delano v. Kitch,* 663 F.2d 990 (10th Cir. 1981), we held that in conducting a retrial, the trial court should follow rulings of law previously made by the court of appeals. That mandate was faithfully followed by the trial court in this case. Under the "law of the case" doctrine, the district court may not deviate from the appellate court's mandate; however, the district court may reconsider an issue and disregard the appellate court mandate *if the subsequent trial produces substantially different evidence. Lindsey v. American Cast Iron Pipe Co.,* 810 F.2d 1094 (11th Cir.1987).

Mason v. Texaco, Inc., 948 F.2d 1546, 1553 (10th Cir. 1991), *cert. denied,* 504 U.S. 910, 112 S.Ct. 1941, 118 L.Ed.2d 547 (1992) (emphasis added). Similarly, *Delano v. Kitch,* cited in *Mason,* indicates that the law of the case must yield to a controlling state court decision—when that decision is issued between the first ruling and a retrial. 663 F.2d at 996. *Cf. McGhee v. Draper,* 639 F.2d 639, 646 (10th Cir.1981). Where the court of appeals has decided an issue, however, its mandate may

---

[72] Likewise, the Tenth Circuit has cited to *Legett*'s treatment of law of the case, but only once, and then it was in the context of the court of appeals' review of its own prior determinations; the district court in that case was expected simply to comply with the mandate. *United States v. Monsisvais,* 946 F.2d 114, 116 (10th Cir.1991).

preclude the consideration of additional evidence on that issue after remand. *See, e.g., Fox v. Mazda Corp. of America,* 868 F.2d 1190, 1194 (10th Cir.1989) (affirming district court's exclusion of proffered expert testimony and damages model on ground it was precluded by the terms of the mandate). Even in the cases from other circuits discussed above, the purported "exceptions" to the mandate rule generally come into play only after remand for purposes of a new trial or other substantive activity. *E.g., Leggett v. Badger,* 798 F.2d 1387, 1389 (remanded for determination of award of attorney's fees). Where the merits of the controversy have been conclusively determined on appeal, "the judgment is no longer subject to district court amendment beyond the ministerial dictates of the mandate." *Colorado Interstate Gas,* 962 F.2d at 1534. "A different result would allow the district court to substitute its opinion for that of this court, which is what the law of the case doctrine is intended to avoid." *United States v. Monsisvais,* 946 F.2d 114, 118 (10th Cir. 1991).

The court of appeals expects district courts to comply with its mandate even where the Supreme Court has indicated that a party may be entitled to relief beyond that afforded by the mandate. In *Citizen Band of Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Comm'n,* 969 F.2d 943 (10th Cir.1992), the Tenth Circuit affirmed the district court's denial of injunctive relief requiring the tribe to collect state cigarette taxes consistent with its obligations under *Oklahoma Tax Comm'n v. Citizen Band of Potawatomi Indian Tribe,* 498 U.S. 505, 111 S.Ct. 905, 112 L.Ed.2d 1112 (1991).

> Nothing in the District Court's order on remand precludes the Tax Commission from pursuing the remedies that the Supreme Court has indicated are available to it.

> The district court precisely followed our remand order which instructed it to dismiss the Tax Commission's counterclaim and enter an injunction prohibiting the Tax Commission from enforcing the challenged assessment for previously uncollected taxes against the Tribe. . . . In going no further, the district court recognized its lack of discretion when confronted with a specific mandate by this court. *See Rutherford v. United States*, 806 F.2d 1455, 1460 (10th Cir.1986) ("district court is . . . bound by the appellate court mandate"). . . .

969 F.2d at 947-48.

This court does not sit in review of judgments of the court of appeals. As tempting as that prospect may sometimes be, Congress has espoused the opposite approach since creating the circuit courts of appeal in 1891,[73] and forming the Tenth Circuit in 1929,[74] a court renamed the United States Court of Appeals for the Tenth Circuit in 1948. *See* CHARLES A. WRIGHT, LAW OF FEDERAL COURTS § 3, at 10 (5th ed. 1994). Given the institutional structure as it exists, with its corresponding allocation of power (*see* 28 U.S.C. § 2106), this court must abide by the court of appeals' mandates unless and until it receives different instructions from the court of appeals. While "[l]aw of the case principles do "not bar a district court from acting unless an appellate decision has issued on the merits of the claim sought to be precluded," [75] here the Tenth Circuit plainly determined the diminishment issue by applying the *Solem* analysis to the Uintah Reservation in its particular historical and factual setting. *Hagen* ap-

---

[73] *See* Evarts Act, Act of March 3, 1891, ch. 517, 26 Stat. 826.

[74] *See* Act of February 28, 1929, ch. 363, 45 Stat. 1346.

[75] *Wilmer v. Board of County Commissioners of Leavenworth County*, 69 F.2d 406, 409 (10th Cir.1995) (quoting *United States v. Caterino*, 29 F.3d 1390, 1395 (9th Cir.1994)).

plied the *Solem* analysis to the same setting, reaching a different result. Both decisions were rendered on the merits.

This court may not substitute its own view for that of the appellate court in either instance.

Recall of the Mandate

Mechanisms do exist for revisiting a court of appeals' mandate where a second look seems warranted. As explained by one well-known treatise:

> If circumstances arise that cast doubt on the correctness of the law of the case as established on appeal, arguments in support of departure must be addressed to the appellate court, either in a petition for rehearing, or if the time for filing a motion for rehearing has passed, by motion for recall of the mandate, or on appeal from the judgment rendered after completion of the proceedings for which the case was remanded.

1B JAMES W. MOORE & JO DESHA LUCAS, MOORE'S FEDERAL PRACTICE ¶ 0.404[10], at II-60—II-61 (2d ed. rev. 1993) (footnotes omitted).[76] The Tenth Circuit acknowledges that a party may "seek . . . to have this court recall its mandate for any correction it thought was necessary to the district court's judgment." *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 962 F.2d

---

[76] *Moore's Federal Practice* further suggests that "[e]ven after judgment is entered on the mandate, however, the district court has the power to consider a motion under Rule 60(b) for relief from judgment, without first obtaining the permission of the court of appeals." 1B MOORE'S FEDERAL PRACTICE ¶ 0.404[10], at II-61 (footnote omitted) (citing *LSLJ Partnership v. Frito-Lay, Inc.*, 920 F.2d 476 (7th Cir.1990)). However, the Tenth Circuit appears to discourage that approach, at least in cases where the merits have been determined on appeal and are no longer *sub judice*. *See* discussion *infra*.

1528, 1533 n. 3 (10th Cir.), *cert. denied*, 506 U.S. 956, 113 S.Ct. 414, 121 L.Ed.2d 337 (1992).

The Navajo Nation sought reconsideration of the reservation disestablishment issue in *Yazzie* using precisely this same procedural device: "In conjunction with the instant appeal, the Navajo Nation filed a motion pursuant to Fed.R.App.P. 27 asking this court to partially recall its earlier mandate in *Pittsburg & Midway I*."

> The Tribe asks us not to apply the doctrine of law of the case so that the reservation diminishment issue decided there may be reexamined. The law of the case is a judicial doctrine designed to promote decisional finality. Once a court decides an issue, the doctrine comes into play to prevent the re-litigation of that issue in subsequent proceedings in the same case. *Arizona v. California*, 460 U.S. 605, 618-19, 103 S.Ct. 1382, 1391, 75 L.Ed.2d 318 (1983); *United States v. Monsisvais*, 946 F.2d 114, 115-16 (10th Cir.1991). The Navajo Nation is correct that unlike the doctrines of res judicata or collateral estoppel, "the law of the case doctrine has long been considered only a rule of practice in the courts and not a limit on their power." *Id.* at 116.
>
> > Nevertheless, the circumstances justifying a departure from the law of the case are narrow. The most widely quoted statement is by former Tenth Circuit Chief Judge Orie Phillips, sitting in another circuit, that the law of the case must be followed "unless the evidence on a subsequent trial was substantially different, controlling authority has since made a contrary decision of the law applicable to such issues, or the decision was clearly erroneous and would work a manifest injustice."

Id. at 117 (quoting *White v. Murtha*, 377 F.2d 428, 432 (5th Cir.1967); *see also Major v. Benton*, 647

F.2d 110, 112 (10th Cir.1981)). We are persuaded that none of these three circumstances exist in the instant case, and therefore deny the Tribe's motion. *Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1536 n. 4 (10th Cir.1995).

The Tenth Circuit's current reading of *Hagen*, articulated in *United States v. Cuch*, 79 F.3d 987 (10th Cir. 1996), that "[t]he *Hagen* decision effectively overruled the contrary conclusion reached in the *Ute Indian Tribe* case, redefined the Reservation boundaries resulting from our earlier decision, and conclusively settled the question," (*Cuch* at 989), may well establish "circumstances justifying a departure from the law of the case." *Watchman*, 52 F.3d at 1536 n. 4.[11] While the Tenth Circuit has said that it may depart from its own "law of the case" on a motion to recall that court's mandate, nothing in *Watchman* even hints that the district court may disregard or defy the appellate court's existing judgment in any respect, absent such a departure by the court of appeals.

Resolution of the Questions Now Presented

A motion to recall the mandate may be filed even after the time to pursue other appellate procedures has expired. *See United States v. Winterhalder*, 724 F.2d 109 (10th Cir.1983). To date, however, it appears that no party has asked the United States Court of Appeals for the Tenth Circuit to recall its mandate in *Ute Indian Tribe* for reconsideration in light of *Hagen*.

---

[11] The Tenth Circuit has acknowledged that where the Supreme Court has made it clear that a new ruling should be applied retroactively, and it would be futile to require the district court to follow its prior order and apply a standard that has been discarded by the Supreme Court, recall of the mandate is appropriate. "Although we rarely exercise such authority, this court does have the inherent power to recall the mandate after it has issued. *Abel v. West*, 932 F.2d 898, 899 (10th Cir.1991); *Hammons v. Int'l Playtex, Inc.*, 872 F.2d 963, 963 (10th Cir.1989)." *Gomez v. State of New Mexico*, 937 F.2d 616 (Table), 1991 WL 132445 (10th Cir., July 15, 1991) (No. 89-2004) (unpublished disposition).

Nor for that matter have the parties made any visible strides in the direction of an agreed long-term resolution of the jurisdictional issues remaining after both *Ute Indian Tribe* and *Hagen*.

Were these parties the only constituents of the necessary jurisdictional mix, this court might well be inclined simply to proceed with specific enforcement of the *Ute Indian Tribe* mandate nothwithstanding the State and Local Defendants' *Hagen*-based objections. However, the Tenth Circuit's *en banc* ruling in *Ute Indian Tribe* does not reach one party indispensable to a practical allocation of jurisdiction within "Indian country": the United States.

If the United States abides by the Supreme Court's decision in *Hagen*—as one normally would expect the United States to do—it must decline to exercise jurisdiction over offenses involving Indians committed within the lands "opened" in 1905. At the same time, *Ute Indian Tribe* would constrain the State and local authorities from exercising jurisdiction over such offenses involving Ute tribal members occurring within that same area. While the Tribe may exert its own jurisdiction pursuant to *Ute Indian Tribe*, Congress has limited the powers of Indian tribes to punish serious offenses. *See* 25 U.S.C.A. § 1302(7) (Supp. 1995) (tribes shall not impose punishment "greater than imprisonment for a term of one year and a fine of $5,000, or both"); *cf. United States v. Wheeler*, 435 U.S. 313, 98 S.Ct. 1079, 55 L.Ed.2d 303 (1978). Moreover, if enforcing the *Ute Indian Tribe* mandate notwithstanding *Hagen* means that in matters affecting tribal members, the State and Local Defendants must treat the Reservation as "Indian country" to the full extent of its original boundaries, this may leave *no* sovereign available to punish *non-Indians* who may commit serious offenses involving Indians or Indian lands within the original boundaries of the Uintah Reservation. *See* 18 U.S.C. § 1152 (1994).[78] As the court of appeals

[78] Generally, "[c]riminal offenses by non-Indians against Indians or their property are subject to the Indian Country Crimes Act

might say, this is "an untenable prospect," and nothing this court may do in crafting a permanent injunction can fill that gap.[79]

For this reason, this court has determined forthwith to raise the question of the continuing force of *Ute Indian Tribe* in light of *Hagen v. Utah* with the court of appeals. While this court *sua sponte* can neither return the Tenth Circuit's mandate nor compel its recall, it seems wholly appropriate under these circumstances to request further instructions from the court of appeals concerning

---

[18 U.S.C. § 1152 (1994)]. The Supreme Court has said that federal court jurisdiction under this Act is exclusive of state court jurisdiction." FELIX S. COHEN, FELIX S. COHEN'S HANDBOOK OF FEDERAL INDIAN LAW 353 (Rennard Strickland ed. 1982) (footnotes omitted). Even if one could say that the State and Local Defendants are not estopped under *Ute Indian Tribe* to prosecute a non-Indian offender in that instance, jurisdiction even to investigate the offense would remain in doubt until the status of a suspect is determined. Coupled with the reduced state and local law enforcement presence in "Indian country" that one might expect under *Ute Indian Tribe*, prosecution under state jurisdiction of a non-Indian committing offenses against tribal members would prove problematic at best.

In this respect, the Supreme Court itself has undertaken to limit Indian tribal sovereignty more severely than any congressional legislation. *See Oliphant v. Suquamish Indian Tribe*, 435 U.S. 191, 98 S.Ct. 1011, 55 L.Ed.2d 209 (1978) (Indian tribes lack criminal jurisdiction over non-Indians as a consequence of their "dependent status"); *United States v. Wheeler*, 435 U.S. 313, 322-323, 98 S.Ct. 1079, 1085-86, 55 L.Ed.2d 303 (1978); *Duro v. Reina*, 495 U.S. 676, 110 S.Ct. 2053, 109 L.Ed.2d 693 (1990) (Indian tribal courts lack criminal jurisdiction over Indians who are not tribal members), *legislatively overruled by* Pub.L. No. 102-137, § 1, 105 Stat. 646 (1991), codified at 25 U.S.C.A. § 1301(2), (4) (Supp. 1995). *See Mousseaux v. U.S. Comm'r of Indian Affairs*, 806 F.Supp. 1433, 1439-1443 (D.S.D.1992).

[79] This kind of practical anomaly seems markedly different from saying that collateral estoppel simply requires that the Government inspect Stauffer Chemical plants in one fashion while inspecting other manufacturers' plants in another fashion. *See United States v. Stauffer Chemical Co.*, 464 U.S. at 174, 104 S.Ct. at 580.

the proper conduct of "further proceedings in accordance with the opinion of this Court" as set forth in the mandate received on December 9, 1986.

A Request for Further Instructions

Such a request is not entirely without precedent. Section 1254(2) of the Judicial Code provides that cases in the court of appeals may be reviewed "[b]y certification at any time by a court of appeals of any question of law in any civil or criminal cases as to which instructions are desired," and upon such certification, "the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy." 28 U.S.C. § 1254(2) (1994). This provision originated in the Act of April 29, 1802, ch. 31, § 6, 2 Stat. 156, 159, and has been adapted over the years as the courts of appeals themselves have evolved. *See* 17 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4038 (2d ed. 1988). The certification mechanism contemplates that a court "may find great difficulty in resolving a question of law, and may believe the question is of such general importance that it should be resolved by the Supreme Court." *Id.* § 4038, at 105. A "somewhat comparable provision for interlocutory review in the courts of appeals," (*id.* § 4038, at 105 & n. 14), is found in 28 U.S.C. § 1292(b).[80]

The analysis of the mandate rule convinces this court that "a lower court must seek permission for an appellate

---

[80] 28 U.S.C. § 1292(b) reads:

> When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal may thereupon, in its discretion, permit an appeal to be taken from such order, . . .

court before departing from the mandate on the ground that intervening changes in the law require re-examination of issues actually decided," (18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478, at 793 (1981)), and this court's request for further instructions is expressly made with that understanding.

Standard Oil Co. v. United States, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976) (per curiam), does not hold to the contrary. *Standard Oil* held that a district court has jurisdiction to entertain a motion under Fed.R. Civ.P. 60(b) to reopen a case following review on appeal without prior leave of the appellate court or the withdrawal of the appellate mandate. In that case, the movant sought to set aside a judgment granting injunctive relief, alleging misconduct on the part of opposing counsel and a witness. Because "the appellate mandate relates to the record and issues then before the court" and "does not purport to deal with possible later events," the Court concluded that a district court would not be "flouting the mandate by acting on the motion." 429 U.S. at 18, 97 S.Ct. at 31 (citing 11 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2873, pp. 269-170 (1973)). The Tenth Circuit has read *Standard Oil* to this effect:

> Under the law the district court retains the power to act on a Rule 60(b) motion after this Court has resolved a matter upon appeal, and there is no necessity that a petition requesting permission to exercise such authority be filed with this Court. *Standard Oil of California v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976); *Wilkin v. Sunbeam Corporation*, 405 F.2d 165 (10th Cir.1968).

Prop-Jets, Inc. v. Chandler, 575 F.2d 1322, 1325 (10th Cir.1978).[81]

---

[81] *Accord*, *Petrick v. Walters*, 81 F.3d 173 (Table), 1996 WL 131686 (10th Cir., Mar. 25, 1996) (No. 95-6356) (unpublished dis-

Even after *Standard Oil*, "[o]f course the district judge is not free to flout the decision of the appellate court as far as it goes, . . ." 11 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2873, at 439 (2d ed. 1995) (footnote omitted). Although *Standard Oil* confirms a district court's jurisdiction under Rule 60(b) to consider "a material change of circumstances or newly-discovered evidence" not considered on appeal—including instances in which the "change of circumstances" is purely legal—the courts of appeal generally have declined to treat a post-appeal "change in decisional law" as grounds for Rule 60(b)(6) relief from a judgment in a matter no longer *sub judice*, even "in federal cases where the Supreme Court has changed the applicable rule of law." *DeWeerth v. Baldinger*, 38 F.3d 1266, 1273 (2d Cir.1994) (Walker, J.) (citing *Picco v. Global Marine Drilling Co.*, 900 F.2d 846, 851 (5th Cir.1990)). This view appears to be consistent with the Tenth Circuit's opinion in *Colorado Interstate Gas* discussed above:

> As a corollary to this [mandate] rule, we are convinced that Rule 60(b)(6) cannot be properly used to alter the substantive content of a judgment once it has been affirmed on appeal except in extraordinary situations. To hold otherwise would be to permit a district court to violate our mandate that a judgment be entered "in accordance with the opinion of this court."

962 F.2d at 1534.[82]

---

position) ("See *Standard Oil Co. of California v. United States*, 429 U.S. 17, 97 S.Ct. 31, 50 L.Ed.2d 21 (1976) (district court may entertain Rule 60(b) motion to reopen an judgment that has been reviewed on appeal without obtaining leave of the appellate court. . . .).").

[82] *Accord, Sack v. Wagoner County, Oklahoma*, 996 F.2d 311 (Table), 1993 WL 220593 (10th Cir.1993) (No. 92-7085, 92-7091) (unpublished disposition):

The State and Local Defendants have not framed, briefed, or argued their pending motion as a Rule 60(b) motion. Even if they had, however, cases such as *Colorado Interstate Gas* suggest that any "change in decisional law" reflected in *Hagen* cannot suffice as grounds for Rule 60(b) relief because the *Ute Indian Tribe* case was no longer *sub judice*—it "was already over" regarding the merits of the diminishment issue.[83]

Simply put, a Rule 60(b) motion made in this setting would appear futile.

These circumstances present "a problem of sound relationships within the judicial hierarchy," (18 CHARLES A. WRIGHT, ARTHUR R. MILLER & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 4478 at 793-794), and raise a question concerning enforcement of the court of appeals' judgment with respect to these parties that evades simple resolution. As a question of public law and the allocation of power among governments, it appears to be of such "general importance" that it should be resolved

---

> The district court may entertain a rule 60(b) motion to reopen a decision that has been affirmed on appeal without obtaining leave from the appellate court. *Standard Oil Co. v. United States*, 429 U.S. 17, 18-19[97 S.Ct. 31, 31-32, 50 L.Ed.2d 21] (1976). The district court, however, must "comply strictly with the mandate rendered by the reviewing court." *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co.*, 962 F.2d 1528, 1534 (10th Cir.), cert. denied, [506 U.S. 956,] 113 S.Ct. 414[121 L.Ed.2d 337] (1992).
>
> . . . .
>
> . . . In this circuit, . . . [Rule 60(b)(6)] cannot be used 'to alter the substantive content of a judgment once it has been affirmed on appeal except in extraordinary situations.' *Colorado Interstate Gas*, 962 F.2d at 1534. . . .

Id. 1993 WL 220593, at *2.

[83] *Standard Oil* thus may be read to say that a district court may consider the question under Rule 60(b), but *Colorado Interstate Gas* instructs that the answer to the question, at least under Rule 60(b)(6), shall in these circumstances be "no."

by the United States Court of Appeals for the Tenth Circuit. In light of the identified area of conflict between the court of appeals' judgment in *Ute Indian Tribe* and the Supreme Court's decision in the *Hagen* case, and the practical consequences which flow from that conflict, further instructions from the court of appeals would clearly be helpful, and would certainly be welcomed.

The court of appeals may also recall its mandate on its own motion, and sometimes it has done so. *See, e.g., Pepcol Mfg. Co. v. Commissioner of Internal Revenue*, 28 F.3d 1013 (10th Cir.1993); *Hammons v. International Playtex, Inc.*, 872 F.2d 963 (10th Cir.1989). *Cf. McCarthy v. Maddigan*, 962 F.2d 973 (10th Cir.1992) (recall of mandate following reversal by Supreme Court). Citing 28 U.S.C. §§ 2106 and 452,[84] the Tenth Circuit articulated the pertinent standard in *Coleman v. Turpen*, 827 F.2d 667 (10th Cir.1987):

> While a mandate once issued by our court will not be recalled except for good cause shown, an appellate court has power to set aside at any time a mandate that was procured by fraud *or act to prevent an injustice*, or to preserve the integrity of the judicial process. *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268 (D.C.Cir.1971), *cert. denied* 406 U.S. 950, 92 S.Ct. 2042, 32 L.Ed.2d 338 (1972). And see discussion, *American Iron and Steel Institute v. E.P.A.*, 560 F.2d 589 (3rd Cir.1977); *cert. denied*, 435 U.S. 914, 98 S.Ct. 1467, 55 L.Ed.2d 505 (1978).

Id. at 671 (emphasis in original) (citing *Clarke v. Boysen*, 273 F. 923 (8th Cir.1921)). The court of appeals may construe this court's request for instructions as an invitation to recall its own mandate, should it so choose. In any

---

[84] 28 U.S.C. § 452 provides in part that the "expiration of a session of court in no way affects the power of the court to do any act or take any proceeding."

event, the motions pending before this court raise a question only the court of appeals is genuinely in a position to answer.

The "Dependent Indian Communities" Question—18 U.S.C. § 1151(b)

Justice Stewart overlooked one practical consequence of that court's finding of reservation diminishment in *Perank:* the question of the applicability of 18 U.S.C. § 1151(b), which provides that "all dependent Indian communities within the borders of the United States whether within the original or subsequently acquired territory thereof, and whether within or without the limits of a state" are within "Indian country" within the meaning of the statute. A finding that Myton, Utah comprises a "dependent Indian community" would once again locate the town within "Indian country," with all of the jurisdictional consequences that flow from that status. *Hagen*'s conclusion that "the town of Myton . . . is not Indian country" likewise appears to be unexamined concerning the applicability of § 1151(b), and consequently may have been somewhat premature.

In the *Yazzie* case, cited by both *Hagen* and *Perank*, the Tenth Circuit held that the boundaries of the 1907-08 Addition to the Navajo Reservation were disestablished through restoration of unallotted lands to the public domain, but remanded the case "for consideration of whether some or all of P & M's South McKinley Mine is within Indian country under 18 U.S.C. §§ 1151(b) or (c). . . ." 909 F.2d at 1422. Though touched upon in the *Yazzie* opinion and addressed in detail in its companion case, *Blatchford v. Sullivan*, 904 F.2d 544-549 (10th Cir. 1990), this logical next step in the analysis was apparently overlooked by both the *Hagen* and *Perank* courts. *See also United States v. State of South Dakota*, 665 F.2d 837 (8th Cir.1981) (Indian housing project located within former Lake Traverse Reservation (*DeCoteau*) is "dependent Indian community" within § 1151(b)).

The Tenth Circuit did not address the applicability of 18 U.S.C. § 1151(b) in *Ute Indian Tribe* because the status of the communities involved as "Indian country" was subsumed in its determination that the Uintah Valley Reservation had not been diminished. Once a different conclusion is reached on the § 1151(a) reservation boundary issue, questions immediately arise as to the application of the balance of the statute—§ 1151(b), which addresses "dependent Indian communities," and possibly § 1151(c), which deems "all Indian allotments, the Indian titles to which have not been extinguished" to be within "Indian country."

While the State and Local Defendants do not dispute that Indian allotments within the original boundaries of the Uintah Valley Reservation remain "Indian country" under § 1151(c) even after *Hagen*, a determination that Myton, Randlett, Duchesne, or other towns are "dependent Indian communities" under § 1151(b) would extend federal and tribal jurisdiction to non-trust, or fee lands located within those towns.

The parties to this proceeding have acknowledged the § 1151(b) question to be a factual issue not yet ripe for determination by this court on the present record. *See, e.g., Transcript of Hearing,* dated September 12, 1994, at 55:6—18 (Mr. Andrews). This issue must therefore await the court of appeals' disposition of this court's more immediate request. Should the § 1151(b) issue become ripe for determination thereafter, the matter will likely be set down for an evidentiary hearing consistent with the analysis detailed in, *e.g., Pittsburg & Midway Coal Mining Co. v. Watchman,* 52 F.3d 1531, 1542-1546 (10th Cir.1995).

If nothing else, consideration of the implications of § 1151(b) will serve to remind everyone that Indian tribes are comprised of communities having "contemporary demographics" of their own, and that the Indians, too, are

"people living in the area." [85] *See, e.g.*, VERONICA E. VELARDE TILLER, ED., TILLER'S GUIDE TO INDIAN COUNTRY 573-574 (1996).

Other Issues: Uncompahgre, the Forest Withdrawals, etc.

As noted above, this court need not and does not reach any question concerning the present status of the Uncompahgre Reservation, of those lands withdrawn from the Uintah Reservation for national forest purposes; the status of both areas was determined on the merits in *Ute Indian Tribe* and neither matter was raised as an issue before the Supreme Court in the *Hagen* case. *State of Utah v. Perank* expressly did not consider the "Indian country" status of either area, (858 P.2d at 934), and counsel has identified no existing conflict between *Ute Indian Tribe* and any other reported decision affecting these areas.[86] Those questions await another day.

Pending disposition of this court's request for further instructions from the court of appeals, this court also defers any dispositive ruling on the Tribe's renewed motion for permanent injunctive relief as well as the State and Local Defendants' motion to dissolve the existing Orders allocating jurisdiction among these parties pursuant to their earlier Stipulation and to dismiss the Tribe's renewed motion for injunctive relief, (*see* Pretrial Order at 15 ¶¶ 5.D) except to the extent that the Order set forth herein further clarifies the existing Order as previously modified. *See* page 1531, *infra*.

The court also chooses to defer the disposition of several other fact-sensitive issues enumerated in the Pretrial Order, such as the status of unpatented tracts within or the subsurface estate underlying, *e.g.*, Myton, Utah, in favor of

---

[85] *Hagen*, 510 U.S. at 421, 114 S.Ct. at 970.

[86] Therefore, the answer to the first issue framed in Paragraph 5.F of the Pretrial Order is "no."

consideration at a later time. *See* Pretrial Order at 14 ¶¶ 4.B, 4.C, 15 ¶ 5.E.

Summary

According to the United States Supreme Court's decision in *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), the 1902-1905 Acts "opening" the Uintah Reservation to non-Indian entry and settlement operated to restore the unallotted and unreserved lands of that Reservation to the public domain. In doing so, the 1902-1905 Acts *diminished*—that is, reduced or curtailed —the boundaries of the Reservation to the extent of the lands thus "opened." Insofar as these "opened" lands were not later returned to tribal ownership and jurisdiction by subsequent congressional and administrative action, they ceased to have reservation status in 1905 and are no longer found within "Indian country" within the meaning of 18 U.S.C. § 1151 (1994). To that extent, *Hagen* stands in direct conflict with the Tenth Circuit's *en banc* judgment in *Ute Indian Tribe*, 773 F.2d 1087 (10th Cir.1985), *cert. denied*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986), which held that all lands within the original exterior boundary of the Uintah Reservation remain within "Indian country" under the statute.

Nonetheless, according to both *Hagen* and *State of Utah v. Perank*,[87] the Uintah Reservation, though diminished, continued to exist after 1905 as to the lands allotted to the Indians and the lands reserved for tribal use. Though diminished, the Reservation continued to have discrete, identifiable boundaries, or "limits" within the meaning of 18 U.S.C. § 1151(a) (1994). Though diminished, "there was no question but that the land within the diminished reservation retained its status as Indian country." [88]

---

[87] 858 P.2d 927, 934 (Utah 1992).

[88] *Chickasaw Nation v. State ex rel. Oklahoma Tax Comm'n*, 31 F.3d 964, 976 n. 8 (10th Cir. 1994), *affirmed in part, reversed in*

The Uintah Reservation boundaries were subsequently enlarged to include areas returned or added through congressional and administrative action. Those reservation lands not "opened" in 1905, together with those areas since restored or added by congressional and administrative action, comprise the current Uintah Reservation. Non-trust or fee lands representing former Indian trust allotments, lands distributed to Mixed-Blood Utes under the Ute Partition Act, or lands exchanged out of trust status by the Tribe located within the boundaries of the Uintah Reservation remain within "Indian country" within the meaning of 18 U.S.C. § 1151(a) (1994), consistent with both *Hagen* and *Ute Indian Tribes*. The State and Local Defendants' assertion that "when lands leave trust status, they no longer fit within any category of 18 U.S.C. § 1151, and so are no longer Indian country," contradicts the express language of 18 U.S.C. § 1151(a) and finds no support in the pertinent case law; under recent Supreme Court decisions, Indian tribal trust lands are embraced "within the limits" of an Indian reservation for purposes of § 1151 (a), and therefore remain within Indian country "notwithstanding the issuance of any patent," *i.e.*, any change in title or ownership.

Sound, well-settled considerations of finality presently bind these parties to the Tenth Circuit's judgment in *Ute Indian Tribe* defining jurisdiction over the "opened" lands. In an opinion for the Court announced four days before this court's initial ruling in this case in 1981, Justice Rehnquist wrote: "This Court has long recognized that '[p]ublic policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest, and that matters once tried shall be

---

part on other grounds and remanded, —— U.S. ——, 115 S.Ct. 2214, 132 L.Ed.2d 400 (1995).

considered forever settled as between the parties.' " [89] The rule of finality " 'is a rule of fundamental and substantial justice, "of public policy and private peace," which should be cordially regarded and enforced by the courts. . . .' " [90]

The mandate of the United States Court of Appeals for the Tenth Circuit in *Ute Indian Tribe v. State of Utah,* received by this court on December 9, 1986, remanded this case to this court "for further proceedings in accordance with the opinion of this Court," referring to the court of appeals' *en banc* ruling reported at 773 F.2d 1087. That mandate remains in full force and effect. As the merits of *Ute Indian Tribe* are no longer *sub judice,* "it is well established that a district court must comply strictly with the mandate rendered by the reviewing court," (*Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America,* 962 F.2d 1528, 1534 (10th Cir.), *cert. denied,* 506 U.S. 956, 113 S.Ct. 414, 121 L.Ed.2d 337 (1992)), and recognizing that even "a new rule cannot reopen the door already closed," [91] this court has no jurisdiction to reconsider the merits of the court of appeals' judgment in light of *Hagen v. Utah,* absent specific direction from the court of appeals that it may do so.

Pursuant to the court of appeals' mandate, conducting "further proceedings in accordance with the opinion" in *Ute Indian Tribe* requires continuing enforcement of the orders previously entered by this court preserving the jurisdictional status quo consistent with that ruling.

---

[89] *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 401, 101 S.Ct. 2424, 2429, 69 L.Ed.2d 103 (1981) (quoting *Baldwin v. Traveling Men's Assn.,* 283 U.S. 522, 525, 51 S.Ct. 517, 517-18, 75 L.Ed. 1244 (1931)).

[90] *Id.* (quoting *Hart Steel Co. v. Railroad Supply Co.,* 244 U.S. 294, 299, 37 S.Ct. 506, 507-08, 61 L.Ed. 1148 (1917)).

[91] *James B. Beam Distilling Co. v. Georgia,* 501 U.S. 529, 541, 111 S.Ct. 2439, 2446, 115 L.Ed.2d 481 (1991) (opinion of Souter, J.)

This court further concludes that the continued enforcement of *Ute Indian Tribe*, to the extent that ruling conflicts with the contrary determination in *Hagen v. Utah*, raises a question of public law and the allocation of power among federal, tribal, state and local governments which evades simple resolution, one that is a "controlling question of law" having "general importance." For that reason, this court shall request further instructions from the United States Court of Appeals for the Tenth Circuit concerning how best to proceed in accordance with that court's existing mandate in light of *Hagen v. Utah*.

This court does not reach any question concerning the determination in *Ute Indian Tribe* of the present status of the Uncompahgre Reservation, or of those lands withdrawn from the Uintah Reservation for national forest purposes as there exists no direct conflict between *Ute Indian Tribe* and *Hagen*, *Perank*, or any other reported case concerning those lands. The question of whether Myton, Utah, or other communities in that area constitute "dependent Indian communities" under 18 U.S.C. § 1151(b) (1994), was not addressed in either *Ute Indian Tribe* or *Hagen v. Utah*, and is not ripe for determination on the present record. For that reason, consideration of that question as well as others shall be deferred to a later date.

Afterword

We live in interesting times.

"As a result of the patina history has placed on the allotment Acts, the Court is presented with questions that their architects could not have foreseen." *Hagen*, 510 U.S. at 426, 114 S.Ct. at 973 (Blackmun, J., dissenting).[92] From the perspective of 1996, questions of diminishment

---

[92] *Accord*, *Ute Indian Tribe*, 521 F.Supp. at 1153 (courts in reservation boundary cases are "called upon to determine the present meaning of statutes under circumstances not imagined by their draftsmen.")

of Indian reservation boundaries necessarily involve some amount of juristic crystal gazing. Those who drafted the Uintah Reservation opening legislation in 1902, 1903, 1904 and 1905 doubtless had no idea whatsoever that the language they chose would be central to the problem of defining federal, state, local, and tribal authority and relationships almost a century later, or that differing readings of those words would precipitate a bitter controversy dividing state and federal courts, a controversy not yet fully resolved in 1996. Yet here we are.

Of course, this matter would largely be resolved had the State of Utah simply chosen to litigate the boundary issue *once*, as its voluntary intervention and joinder at the outset of this action twenty years ago may then have implied. Instead, the State chose to press its Ute boundary diminishment theory in the state criminal cases, and upon prevailing in *Perank* and by extension, in *Hagen* and *Coando*, the State had achieved a circumstance in which the boundary issue was primed for review by the United States Supreme Court.

Likewise, this matter would now be far simpler had the United States Supreme Court afforded the Ute Indian Tribe the opportunity to participate in the *Hagen* appeal as a party. Had the Court done so,[93] the Ute Indian Tribe would undoubtedly have been bound by whatever decision on the merits the Court ultimately made, and the present dilemma would not have arisen. *See also Perank*, 858 P.2d at 953-958 (Zimmerman, J., dissenting).

But life is seldom simple.

All of the parties to this proceeding, together with the court, must somehow arrive at a resoution of the pending

---

[93] Motions to intervene for the first time before the Supreme Court are unusual, but not unheard of. *See, e.g., United States Parole Commission v. Geraghty*, 445 U.S. 388, 390, 100 S.Ct. 1202, 1205, 63 L.Ed.2d 479 (1980); *Karcher v. May*, 483 U.S. 1017, 107 S.Ct. 3258, 97 L.Ed.2d 758 (1987) (mem.) (motion for leave to intervene denied).

jurisdictional questions that proves both rational and workable over the long term. For the Tribe, this means adjusting its jurisdictional aspirations to account for the practical effects of the Supreme Court's decisions in *Hagen v. Utah*, whatever the immediate disposition of this proceeding may be. For their part, the State and Local Defendants must now cope with the benefits—and the burdens—of the "more favorable result" obtained in the *Hagen* appeal.[94] The defendants would do well to recognize that "[t]he past cannot always be erased by a new judicial declaration," [95] and that even after *Hagen*, "people living in the area" of the Uintah Reservation includes *both* Indian and non-Indian residents, whose interests, concerns, and expectations deserve thoughtful consideration and most of all, respect.

The happiest peace is that which parties working together can find for themselves.

In light of the foregoing, therefore,

IT IS ORDERED, that this court's previous Order, dated September 2, 1992 (*nunc pro tunc* to August 3, 1992), as modified "to allow the State and Local Defendants to prosecute felony crimes occurring on lands within the original boundaries of the Uintah Valley Reservation which are not 'Indian Country' as defined by 18 U.S.C. § 1151, *et seq.*" by this court's Order, dated May 2, 1994, is hereby further modified to clarify that for the purposes of the Order, "lands . . . which are not 'Indian Country' " includes those unallotted and unreserved lands of the Uintah Reservation that were opened to entry in 1905, to the extent that those lands were not later restored to tribal ownership or otherwise reincorporated within the Reservation by subsequent congressional and administrative ac-

---

[94] "Be careful what you wish for—you might get it." Oscar Wilde (1854-1900).

[95] *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374, 60 S.Ct. 317, 318, 84 L.Ed. 329 (1940).

tion, consistent with *Hagen v. Utah*, 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994); as thus clarified, the Order shall remain in full force and effect pending the disposition of this court's Certification and Request for Instructions from the United States Court of Appeals for the Tenth Circuit, or such further proceedings as may be conducted before that court addressing the questions raised herein, in any event until further order of this court.

IT IS FURTHER ORDERED that the Clerk of this court forthwith shall transmit the accompanying Certificate and Request for Further Instructions, together with three copies of the Certificate and three copies of this Memorandum Opinion and Order, to the Clerk of the United States Court of Appeals for the Tenth Circuit.

CERTIFICATE AND REQUEST FOR FURTHER INSTRUCTIONS

TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT:

The above-captioned proceeding last came before the United States Court of Appeals for the Tenth Circuit on rehearing *en banc* and was decided on September 17, 1985. *Ute Indian Tribe v. State of Utah*, 773 F.2d 1087 (10th Cir.1985). Following that ruling, the United States Supreme Court denied certiorari. *State of Utah v. Ute Indian Tribe*, 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1986). The court of appeals issued its Judgment pursuant to the *en banc* ruling, dated September 17, 1985, which together with the *en banc* opinion was received as the court of appeals' mandate pursuant to Fed.R.App.P. 41(a) and docketed by the Clerk of this court on December 8, 1986.

In its *en banc* ruling, the court of appeals held that the Uintah Valley Reservation, created by Executive Order in 1861 [1] and confirmed by Act of Congress in 1964, [2] had not been diminished by congressional legislation enacted from 1902 through 1905 opening unallotted and unreserved lands on the Reservation to entry under the homestead and townsite laws,[3] or by the inclusion of portions of the Reservation among lands withdrawn as national forest lands by Act of Congress and Presidential Procla-

---

[1] Executive Order 38-1 (reprinted in 1 Charles Kappler, *Indian Affairs: Laws and Treaties* 900 (1904)).

[2] Act of May 5, 1864, ch. 77, 13 Stat. 63.

[3] *See* Act of May 27, 1902, ch. 888, 32 Stat. 263; J.Res. 31, 57th Cong., 1st Sess., 32 Stat. 744 (1902); Act of March 3, 1903, ch. 994, 32 Stat. 998; Act of April 21, 1904, ch. 1402, 33 Stat. 207; Act of March 3, 1905, ch. 1479, 33 Stat. 1069. (The complete text of this legislation is reprinted in Appendix A to this court's initial memorandum opinion. *See Ute Indian Tribe v. State of Utah*, 521 F.Supp. 1072, 1167-1174 (D.Utah 1981).)

mation in 1905.[4] 773 F.2d at 1088-1090; *see also id.* at 1099-1100 (Seymour, Holloway, McKay & Logan, JJ., concurring).

According to the United States Supreme Court's decision in *Hagen v. Utah,* 510 U.S. 399, 114 S.Ct. 958, 127 L.Ed.2d 252 (1994), the 1902-1905 Acts "opening" the Uintah Reservation to non-Indian entry and settlement operated to restore the unallotted and unreserved lands of that Reservation to the public domain. In doing so, the 1902-1905 Acts *diminished*—that is, reduced or curtailed—the boundaries of the Reservation to the extent of the lands thus "opened." Insofar as these "opened" lands were not later returned to tribal ownership and jurisdiction by subsequent congressional and administrative action, they ceased to have reservation status in 1905 and are no longer found within "Indian country" within the meaning of 18 U.S.C. § 1151 (1994). To that extent, *Hagen* stands in direct conflict with the court of appeals' *en banc* judgment in *Ute Indian Tribe,* 773 F.2d 1087 (10th Cir.1985), *cert. denied,* 479 U.S. 994, 107 S.Ct. 596, 93 L.Ed.2d 596 (1996), which held that all lands within the original exterior boundary of the Uintah Reservation remain within "Indian country" under the statute.

In *United States v. Cuch,* 79 F.3d 987 (10th Cir.1996), the court of appeals described the effect of *Hagen* in these terms: "[t]he *Hagen* decision effectively overruled the contrary conclusion reached in the *Ute Indian Tribe* case, redefined the Reservation boundaries resulting from our earlier decision, and conclusively settled the question." *Cuch,* at 989. Nevertheless, consistent with principles of finality, the court of appeals held that *Hagen* is not available as a ground for collateral review of federal criminal convictions which became final prior to the *Hagen* decision.

---

[4] *See* Act of March 3, 1905, ch. 1479, 33 Stat. 1069; Proclamation of July 14, 1905, 34 Stat. 3116 (reprinted in 3 Charles Kappler, *Indian Affairs: Laws and Treaties* 602-605 (1913)).

The court of appeals' final Judgment in the above-captioned proceeding remains in place, having never been recalled or otherwise withdrawn. Motions are now pending before this Court concerning the appropriateness of injunctive relief designed to enforce the terms of the court of appeals' Judgment, notwithstanding the Supreme Court's determination in *Hagen*. (A copy of this court's Memorandum Opinion and Order addressing the issues raised by those motions and the grounds for this Certificate and Request for Further Instruction is provided herewith.)

These circumstances present a problem of sound relationships within the judicial hierarchy, and raise a question concerning enforcement of the court of appeals' Judgment with respect to these parties that evades simple resolution. As a controlling question of public law and the allocation of power among governments, it appears to be of such "general importance" that it should be resolved by the United States Court of Appeals for the Tenth Circuit. This court's analysis of the "mandate rule" component of the doctrine of "law of the case," set forth in detail in this court's accompanying Memorandum Opinion and Order, convinces this court that "a lower court must seek permission from an appellate court before departing from the mandate on the ground that intervening changes in the law require re-examination of issues actually decided," (18 Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4478, at 793 (1981), and this court's request for further instructions is expressly made with that understanding. Cf. *Colorado Interstate Gas Co. v. Natural Gas Pipeline Co. of America*, 962 F.2d 1528, 1533-1535 & n. 3 (10th Cir.) ("The rule is well established that a district court must comply strictly with the mandate rendered by the reviewing court."), *cert. denied*, 506 U.S. 956, 113 S.Ct. 414, 121 L.Ed.2d 337 (1992).

Therefore,

In light of the identified area of conflict between the court of appeals' Judgment in *Ute Indian Tribe* and the Supreme Court's decision in the *Hagen* case, and the practical consequences which flow from that conflict, this court hereby requests further instructions from the court of appeals concerning the proper conduct of "further proceedings in accordance with the opinion of this Court" as set forth in the Judgment dated September 17, 1985 and received by this court on December 9, 1986.

Further instructions on this question would clearly be helpful, and would certainly be welcomed. If it so chooses, the court of appeals may construe this court's request for instructions as an invitation to recall its own mandate for futher consideration. *See Coleman v. Turpen*, 827 F.2d 667, 671 (10th Cir. 1987); *cf. Pittsburg & Midway Coal Mining Co. v. Watchman*, 52 F.3d 1531, 1536 n. 4 (10th Cir.1995) (Indian tribe "filed a motion pursuant to Fed. R.App.P. 27 asking [the court of appeals] to partially recall its earlier mandate" concerning reservation diminishment issue).

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

No. 96-4073

UTE INDIAN TRIBE OF THE UINTAH AND OURAY RESERVATION,
Plaintiff-Appellee,

v.

STATE OF UTAH; DUCHESNE COUNTY, a political subdivision of the State of Utah; ROOSEVELT CITY, a municipal corporation; DUCHESNE CITY, a municipal corporation; UINTAH COUNTY, a political subdivision of the State of Utah,
Defendants-Appellants,

and

UNITED STATES OF AMERICA,
Amicus Curiae.

ORDER

Filed July 1, 1997

Before TACHA, GODBOLD* and HOLLOWAY, Circuit Judges.

---

* The Honorable John C. Godbold, Senior Circuit Judge, United States Court of Appeals for the Eleventh Circuit, sitting by designation.

Appellants' petition for rehearing is denied by the panel that rendered the decision.

The suggestion for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. No member of the panel and no judge in regular active service on the court requested that the court be polled on rehearing en banc so the suggestion for rehearing is also denied.

Entered for the Court
PATRICK FISHER
Clerk of Court

by: /s/ [Illegible]
Deputy Clerk

APPENDIX D

STATUTORY PROVISIONS

Act of May 27, 1902, ch. 888, 32 Stat. 245, 263-264, I Kapp. 750, 753 (2d ed. 1904), LD 82:

That the Secretary of the Interior, with the consent thereto of the majority of the adult male Indians of the Uintah and the White River tribes of Ute Indians, be ascertained as soon as practicable by an inspector, shall cause to be allotted to each head of a family eighty acres of agricultural land which can be irrigated and forty acres of such land to each other member of said tribes, said allotments to be made prior to October first, nineteen hundred and three, on which date all the unallotted lands within said reservation shall be restored to the public domain: *Provided,* That persons entering any of said land under the homestead law shall pay therefor at the rate of one dollar and twenty-five cents per acre: *And provided further,* That nothing herein contained shall impair the rights of any mineral lease which has been approved by the Secretary of the Interior, or any permit heretofore issued by direction of the Secretary of the Interior to negotiate with said Indians for a mineral lease; but any person or company having so obtained such approved mineral lease or such permit to negotiate with said Indians for a mineral lease on said reservation, pending such time and up to thirty days before said lands are restored to the public domain as aforesaid, shall have in lieu of such lease or permit the preferential right to locate under the mining laws not to exceed six hundred and forty acres of contiguous mineral land, except the Raven Mining Company, which may in lieu of its lease locate one hundred mining claims of the character of mineral mentioned in its lease; and the proceeds of the sale of the lands so restored to the public domain shall be applied, first, to the reimbursement of the United States for any moneys advanced to

said Indians to carry into effect the foregoing provisions; and the remainder, under the direction of the Secretary of the Interior, shall be used for the benefit of said Indians. And the sum of seventy thousand and sixty-four dollars and forty-eight cents is hereby appropriated, out of any moneys in the Treasury not otherwise appropriated, to be paid to the Uintah and the White River tribes of Ute Indians, under the direction of the Secretary of the Interior, whenever a majority of the adult male Indians of said tribes shall have consented to the allotment of lands and the restoration of the unallotted lands within said reservation as herein provided.

Said item of seventy thousand and sixty-four dollars and forty-eight cents to be paid to the Uintah and White River Utes covers claims which these Indians have made on account of the allotment of lands on the Uintah Reservation to Uncompahgre Indians and for which the Government has received from said Uncompahgre Indians money aggregating sixty thousand and sixty-four dollars and forty-eight cents; and the remaining ten thousand dollars claimed by the Indians under an Act of Congress detaching a small part of the reservation on the east and under which Act the proceeds of the sale of the lands were to be applied for the benefit of the Indians.

* * * *

Act of March 3, 1905, ch. 1479, 33 Stat. 1048, 1069-1070, III Kapp. 124, 146-147 (1913), LD 105:

That so much of the act of March third, nineteen hundred and three, as provides that the grazing lands to be set apart for the use of the Uintah, White River Utes, and other Indians on the Uintah Reservation, as provided by public resolution numbered thirty-one of June nineteenth, nineteen hundred and two, shall be confined to the lands south of the Strawberry River, be, and the same is hereby, repealed.

That the time for opening to public entry the unallotted lands on the Uintah Reservation in Utah having been fixed by law as the tenth day of March, nineteen hundred and five, it is hereby provided that the time for opening said reservation shall be extended to the first of September, nineteen hundred and five, unless the President shall determine that the same may be opened at an earlier date and that the manner of opening such lands for settlement and entry, and for disposing of the same, shall be as follows: That the said unallotted lands, excepting such tracts as may have been set aside as national forest reserve, and such mineral lands as were disposed of by the act of Congress of May twenty-seventh, nineteen hundred and two, shall be disposed of under the general provisions of the homestead and town-site laws of the United States, and shall be opened to settlement and entry by proclamation of the President, which proclamation shall prescribe the manner in which these lands may be settled upon, occupied, and entered by persons entitled to make entry thereof; and no person shall be permitted to settle upon, occupy, or enter any of such lands, except as prescribed in said proclamation, until after the expiration of sixty days from the time when the same are thereby opened to settlement and entry: *Provided,* That the rights of honorably discharged Union soldiers and sailors of the late Civil and the Spanish War or Philippine insurrection, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes, as amended by the act of March first, nineteen hundred and one, shall not be abridged: *And provided further,* That all lands opened to settlement and entry under this act remaining undisposed of at the expiration of five years from the taking effect of this act shall be sold and disposed of for cash, under rules and regulations to be prescribed by the Secretary of the Interior, not more than six hundred and forty acres to any one person. The proceeds of the sale of such lands shall be applied as provided in the act

of Congress of May twenty-seventh, nineteen hundred and two, and the acts amendatory thereof and supplemental thereto.

That before the opening of the Uintah Indian Reservation the President is hereby authorized to set apart and reserve as an addition to the Uintah Forest Reserve, subject to the laws, rules, and regulations governing forest reserves, and subject to the mineral rights granted by the act of Congress of May twenty-seventh, nineteen hundred and two, such portion of the lands within the Uintah Indian Reservation as he considers necessary, and he may also set apart and reserve any reservoir site or other lands necessary to conserve and protect the water supply for the Indians or for general agricultural development, and may confirm such rights to water thereon as have already accrued: *Provided,* That the proceeds from any timber on such addition as may with safety be sold prior to June thirtieth, nineteen hundred and twenty, shall be paid to said Indians in accordance with the provisions of the act opening the reservation.[1]

That the Raven Mining Company shall, within sixty days from the passage of this act, file for record, in the office of the recorder of deeds of the county in which its claims are located, a proper certificate of each location; and it shall also, within the same time, file in the office of the Secretary of the Interior, in the city of Washington, said description and a map showing the locations made by it on the Uintah Reservation, Utah, under the act of Congress of May twenty-seventh, nineteen hundred and two (Statutes at Large, volume thirty-two, page two hundred and sixty-three); and thereupon the Secretary of the Interior shall forthwith cause said locations to be inspected and report made, and if found to contain the character of mineral to which said company is entitled by the act of Congress aforesaid and that each of said claims does not exceed the size of a regular mining claim, to wit, six hundred by fifteen hundred feet, he shall issue a patent in fee to the Raven Mining Company for each

of said claims: *Provided further,* That the Florence Mining Company entitled under the act of Congress approved May twenty-seventh, nineteen hundred and two, to the preferential right to locate not to exceed six hundred and forty acres of contiguous mineral land in the Uintah Reservation, Utah, shall within sixty days from the passage of this act file in the office of the recorder of deeds of the county in which its location is made a proper description of its claim, and it shall within the same time file in the office of the Secretary of the Interior said description and a map showing the location made by it on the Uintah Reservation, Utah, and thereupon the Secretary of the Interior shall forthwith cause said location to be inspected and report thereon made, and if found not to exceed six hundred and forty acres he shall issue a patent in fee to said company for the said land: *And provided further,* That the extension of time for opening the unallotted lands to public entry herein granted shall not extend the time to make locations to any person or company heretofore given a preferential right, but the Raven Mining Company and the Florence Mining Company pending the time for opening to public entry the Uintah Reservation shall have the right of ingress and egress to and from their respective properties over and through said reservation.

* * * *